IN THE SUPREME COURT OF FLORIDA

MICHAEL COLEMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC04-1520

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Coleman." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. The following references will be used:

"IB"	In this postconviction appeal, the Initial Brief dated as served January 14, 2009;
"R"	The 14-volume record of the direct appeal;
"PCR"	The initial eight-volume postconviction record;
"PCR-S"	The five-volume Supplemental postconviction record;
"PCR-S2"	The four-volume Second Supplemental postconviction record;
"PCR-S3"	The two-volume third supplemental postconviction record designated as volume numbers "18" and "19";
"SE";"DE"	State's Exhibit and Defense Exhibit, respectively.

When applicable, volume numbers as designated by the Circuit Court, and page numbers follow the foregoing symbols.

Unless the contrary is indicated, **bold-typeface** emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

Case History.

On September 20, 1988, (See, e.g., R/IV 778-80, PCR/I 7-11) the four murders and other felonies occurred from which this case and these proceedings arose. In 1989, indictments charged Michael Coleman with the

following charges: First Degree Murder (4 counts), Attempted First Degree Murder (1 count), Armed Kidnapping (6 counts), Armed Sexual Battery (2 counts), Conspiracy to Traffic in Cocaine (1 count), Armed Robbery (2 counts), and Armed Burglary of a Dwelling (1 count). (R/I 2106-2110; PCR/I 7-12)

Michael Coleman, Timothy Robinson, and Darrell Frazier were tried together (See, e.g., R/IV 594; R/XI 1970-77), and Ronald Williams was tried separately, See Williams v. State, 622 So.2d 456, 460 (Fla. 1993).

Ted Stokes represented Coleman at the trial. (E.g., R/XI 1950)

June 1, 1989, the jury found Coleman guilty as charged on all counts. (R/XIII 2415-23; PCR/I 89-97) June 2, 1989, in the jury penalty phase, the parties called various witnesses. (R/XI 1988-2095) The jury recommended life by a vote of six to six. (PCR/I 98) July 25, 1989, Coleman's trial counsel, Ted Stokes, served a memorandum in Opposition of the Death Penalty. (R/XIV 2615-17; PCR/I 122-24) July 25, 1989, the Circuit Court conducted a hearing to afford the parties an additional opportunity to present circumstances and argument for the Court to consider for sentencing. (R/XIV 2480-2509)

September 29, 1989, the Circuit Court sentenced Coleman to death, weighing several aggravating and non-statutory mitigating circumstances. (R/XIV 2588-94, 2609-14; PCR/I 103-108)

December 24, 1992, this Court affirmed all the convictions and the sentences of death in Coleman v. State, 610 So.2d 1283 (Fla. 1992). The Court upheld four aggravating circumstances ("prior conviction of a violent

felony; committed while engaged in robbery, sexual battery, burglary, and kidnapping; … heinous, atrocious, or cruel; and cold, calculated, and premeditated") and struck one of them ("avoid, prevent arrest aggravator"). 610 So.2d at 1287. Coleman's death sentences were upheld as proportionate, including a comparison of his situation with an accomplice (Frazier), who received a life sentence. Id. at 1287-88.

October 12, 1993, Coleman v. Florida, 510 U.S. 921 (U.S. 1993), denied Coleman's petition for writ of certiorari.

From 1994 to 2007, various attorneys represented Coleman in the postconviction proceedings, ranging, for example, from CCR to Mr. Rollo to Ms. Laverde to Mr. Harrison to Mr. McClain to Mr. Brody. (See, e.g., PCR-S 20; PCR-S2/I 1009-10; PCR-S/III 373; PCR-S/III 428-29; PCR/VIII 1247-48; PCR-S/V 842-43; PCR/VIII 1254-55)

On February 3, 2000, Coleman, through Ms. Laverde, filed his Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend. (PCR/III 349-448) April 4, 2000, the State filed its Response to the February 2000 postconviction Motion to Vacate. (PCR/III 454-517) July 25, 2000, the Circuit Court conducted a hearing pursuant to Huff v. State, 569 So.2d 1247 (Fla. 1990). (PCR/IV 519-68) August 2, 2000, the Circuit Court entered its Order on Huff Hearing, granting an evidentiary hearing on claims IV (withholding exculpatory impeachment evidence), VIII (IAC), and IX (inadequate mental health assistance). (PCR/IV 570-73) January 24 and 25, 2001, the Circuit Court conducted an evidentiary hearing. (PCR/V,VI)

In 2001, 2002, and 2003, Coleman pro se filed a number of items in Circuit Court. (See PCR-S/IV 722-24; PCR-S/V 798; PCR-S/V 816-17; PCR-S/V 832-39)

February 28, 2002, Ms. Laverde filed a Motion to Hold in Abeyance the postconviction proceedings pending an evaluation by Dr. Enrique Suarez, Ph.D., and citing to the pendency of Atkins v. Virginia and the recent enactment of Section 921.137, Fla. Stat. (PCR-S/IV 754-57)

May 14, 2004, Mr. Harrison filed a Notice of Withdrawal of Atkins Claim and Request to Hold Proceedings in Abeyance. (PCR/VIII 1273-74)

The Circuit Court entered a comprehensive Order Denying the Defendant's Motion to Vacate Judgments of Conviction and Sentences. (PCR/VIII 1285-1323)

September 23, 2005, this Court granted Mr. McClain's April 18, 2005, Motion for a Relinquishment of Jurisdiction for a Determination of Mental Retardation and directed the Circuit Court to "hold an evidentiary hearing to determine whether the defendant has mental retardation as defined by Florida Rule of Criminal Procedure 3.203." (PCR-S2/I 926)

July 17, 2007, the Circuit Court conducted an evidentiary hearing on the Atkins claim. (PCR-S2/II 1072-1203)

At the evidentiary hearing, the Circuit Court judicially noticed, at the State's request, the prior trial and postconviction proceedings in this case. (See PCR-S2/II 1092) Dr. Toomer testified (PCR-S2/II 1093-1124), as well as Dr. Larson (PCR-S2/II 1125-79).

August 1, 2007, the Circuit Court rendered an order finding that Coleman is not mentally retarded. (PCR-S2/III 1311-96) The Order detailed evidence at the Atkins hearing as well as the original trial proceedings. (PCR-S2/III 1313-21) [**ISSUE IV**] The Order concluded that the Court was satisfied that Coleman competently waived his appearance at the Atkins hearing. (PCR-S2/III 1311 n.1 and accompanying text) [**ISSUE IV**]

August 2, 2007, pursuant to this Court's May 4, 2006, Order in SC05-2217, the Circuit Court conducted a hearing concerning Mr. Harrison's fess.[1]

January 10, 2008, this Court decided Williams v. State, 987 So.2d 1 (Fla. 2008), which reduced Williams' sentence to life in prison. [**ISSUE III**]

Coleman's Role in the Murders.

This Court's direct appeal opinion summarized the basic facts surrounding the murders and related felonies:

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[1] The undersigned Assistant Attorney General appeared at the hearing, but he excused himself at the outset because, in an abundance of caution, he was concerned that attorney-client privileged postconviction communications could be discussed. An attorney for DFS, Lori Job, attended the hearing for the State. To the best of undersigned's knowledge, the transcript of the August 2 hearing remains sealed and unavailable to undersigned (See PCR-S2/III 1405), and undersigned has "firewalled" himself from Ms. Job concerning the hearing's communicative content. In reviewing the record of this case for this brief, undersigned also sealed and did not read PCR-S2/IV 1407-77 because the Index indicated they were exhibits at the August 2, 2007, hearing. If the Court wishes undersigned to address in this proceeding any of the sealed matters, undersigned requests a written Order authorizing him to review the sealed materials.

Michael Coleman, Timothy Robinson, and brothers Bruce and Darrell Frazier were members of the 'Miami Boys' drug organization, which operated throughout Florida. Pensacola members of the group moved a safe containing drugs and money to the home of Michael McCormick from which his neighbors Derek Hill and Morris Douglas stole it. Hill and Douglas gave the safe's contents to Darlene Crenshaw for safekeeping.

Late in the evening of September 19, 1988 Robinson, Coleman, and Bruce Frazier, accompanied by McCormick, pushed their way into Hill and Douglas' apartment. They forced Hill and Douglas, along with their visitors Crenshaw and Amanda Merrell, as well as McCormick, to remove their jewelry and clothes and tied them up with electrical cords. Darrell Frazier then brought Mildred Baker, McCormick's girlfriend, to the apartment. Robinson demanded the drugs and money from the safe and, when no one answered, started stabbing Hill. Crenshaw said she could take them to the drugs and money and left with the Fraziers. Coleman and Robinson each then sexually assaulted both Merrell and Baker.

After giving them the drugs and money, Crenshaw escaped from the Fraziers, who returned to the apartment. Coleman and Robinson then slashed and shot their five prisoners, after which they and the Fraziers left. Despite having had her throat slashed three times and having been shot in the head, Merrell freed herself and summoned the authorities. The four other victims were dead at the scene.

Merrell and Crenshaw identified their abductors and assailants through photographs, and Coleman, Robinson, and Darrell Frazier were arrested eventually. A grand jury returned multiple-count indictments against them, charging first-degree murder, attempted first-degree murder, armed kidnapping, armed sexual battery, armed robbery, armed burglary, and conspiracy to traffic. Among other evidence presented at the joint trial, the medical examiner testified that three of the victims died from a combination of stab wounds and gunshots to the head and that the fourth died from a gunshot to the head. Both Crenshaw and Merrell identified Coleman, Robinson, and Frazier at trial, and Merrell identified a ring Coleman gave to a girlfriend as having been taken from her at the apartment. Several witnesses testified to drug dealing in Pensacola and to the people involved in that enterprise. Coleman and Robinson told their alibis to the jury with Coleman claiming to have been in Miami at the time of these crimes and Robinson claiming he had been in New Jersey then.

Because Coleman's **ISSUE I** claims IAC in the penalty phase and **ISSUE III** argues that Coleman should be treated like Williams, in those issues the

State will elaborate on Coleman's role at the scene of the murders, where he was known as "Max or "Mac" (R/VII 1296; R/VIII 1360-61).

Coleman's Trial Testimony.

A number of the current claims place Coleman's mental status at issue. The State submits Coleman's guilt (R/VIII 1492-1518) and penalty phase (R/XI 2032-35) trial testimony as among the pertinent evidence.

For example, Coleman testified:

> Well, on the 19th I was at – I remember being at my mother's house because I was feeling kind of tired and exhausted, you know, and about going to the 20th or something like that as I said I was with a female named Cassandra. And we like had a little spew about Demetra being pregnant ….

(R/VIII 1494-95) He narrated some events while, he said, he was staying at his mother's house. (R/VIII 1500) He testified that he gave Deedee $1200 to assist with her getting an apartment. (R/VIII 1500-1501) "She messed $700 up and I took $500 back because she never did go get that the apartment." (R/VIII 1501)

Coleman testified to directions to a motel: Head South from his house "down 67 and hit 95," then go over to downtown, the "[a]ddress was on the key, on the handle of the key." (R/VIII 1507) When he left Cassandra on the 20th, he recalled giving her $600 to $700 for her to get her car transmission fixed. (R/VIII 1496) He characterized breaking up with Cassandra as "disassociate[ing] himself from her. He explained that when he broke up with her, he recovered all the jewelry he had given to her "because I figured it was of value." (R/VIII 1496) He said that he wanted

to call Cassandra as a witness "so she could verify that she saw me in Miami at the time." (R/VIII 1498)

Coleman testified that he made his money by gambling. (R/VIII 1501-1502, 1511) On cross-examination, he said he plays "crap" a lot. (R/VIII 1504) He said that the $600 to $700 "wasn't no bunch of money" because he had been "doing some good gambling." (R/VIII 1510) He did not need to work because he was doing well enough from gambling. (R/VIII 1511) When Coleman's mother was asked whether Coleman is a "pretty good card player," she responded, "Well, I haven't seen nobody beat him yet." (R/VIII 1462)

Guilty Verdicts, Penalty-Phase, and Sentencing Proceedings.

After the jury returned verdicts of guilty as charged (R/XI 1972-75; R/XIII 2415-23) as to all 17 counts of the Indictment (R/XII 2106-2110), the penalty phase of the jury trial began (R/XI 1988).

In the jury penalty phase of the trial, Coleman's counsel, Ted Stokes, cross-examining Amanda Merrill, elicited from her that she did not think that Coleman shot her or anyone else at the murder scene. (R/XI 2007)

Mr. Stokes called Dolly Leverson, Coleman's mother (See R/VIII 1457-58), as a jury penalty-phase witness. (R/XI 2029-32) There was no cross-examination. (See R/XI 2032) Coleman testified at the penalty phase. (R/XI 2032) His testimony included long narratives. (See R/XI 2033-34)

Coleman's counsel, Mr. Stokes, argued for a life recommendation from the jury. (See R/XI 2075-82) Stokes argued Coleman's non-violent personality and basketball prowess. (R/XI 2080-81) Over an overruled prosecution objection (R/XI 2079), Stokes also reiterated Coleman's

innocence and then requested the jury to consider it versus the finality of the death penalty (R/XI 2078-79, 2081-82).

The jury recommended life in prison for Coleman six-to-six (R/XI 2096), as well as life for co-defendants Darrell Frazier eleven-to-one (R/XI 2096) and Timothy Robinson six-to-six (R/XI 2096-97).

On July 25, 1989, the Circuit Court, sitting without jury, resumed the sentencing phase. (R/XIV 2478-2508) Coleman's counsel referenced his sentencing memorandum. (R/XIV 2482, 2488-89; see also R/XIV 2615-17) Mr. Stokes argued for Coleman that the judge should follow the jury's life recommendation and supported the argument with several points. (See R/XIV 2482-93)

On September 29, 1989, the Circuit Court sentenced Coleman to death. (R/XIV 2588-94) It found the following aggravating circumstances: Prior conviction of a violent felony; Committed while engaged in robbery, sexual battery, burglary, and kidnapping; HAC; and CCP. (R/XIV 2611-12)

The trial court discussed several potential mitigators. It indicated that the no-significant-prior-criminal-history mitigator was not applicable because of a prior robbery. (R/XIV 2612) It rejected Coleman's argument that his role was minor:

> He tied up the victims, raped two of them and unsuccessfully attempted to kill one by cutting her across the throat thrice with a knife. The fact that she lived is certainly not attributable to intentional acts of this Defendant to spare her life.

(R/XIV 2612) It pointed out that Coleman was 27 years old at the time of the murders. (R/XIV 2613) It considered and weighed a number of non-statutory mitigating factors, including Coleman's "close family ties

throughout his life and has been supportive of his mother." (R/XIV 2613) It discussed as non-mitigating Coleman's level of education, rearing in Liberty City, athletic potential, and victims' background, but also indicated that even if such factors exist they would not outweigh the aggravating factors (See R/XIV 2613).

Direct Appeal.

This Court, in Coleman v. State, 610 So.2d 1283 (Fla. 1992), rejected several direct-appeal claims. 610 So.2d at 1285-87. Concerning the sentencing, this Court "f[ou]nd the evidence insufficient to support the avoid, prevent arrest aggravator, but upheld the other four aggravating factors as "amply supported by the record," Id. at 1287.

This Court discussed mitigation, the death sentence, proportionality, and continued:

> That Frazier received a lesser sentence does not make Coleman's death sentence disproportionate. The record demonstrates that he was less involved and less culpable than Coleman or Robinson. In addition, the jury convicted Frazier of first-degree murder of only one of the victims and second-degree murder of the other. … *Scott v. Dugger*, 604 So.2d 465 (Fla. 1992), is factually distinguishable and does not provide a basis for relief here.
>
> Therefore, we affirm Coleman's convictions and sentences of death.

610 So.2d at 1287-88.

Postconviction Evidentiary Hearing and Order.

After a Huff hearing (PCR/IV 519-68), the Circuit Court granted an evidentiary hearing on Claims --

> IV, alleging withholding exculpatory impeachment evidence of several checks to Amanda Merrill as consideration in exchange for her testimony and failure to disclose criminal histories of several witnesses (PCR/III 372-78) [See **ISSUE VI** infra];

VIII, alleging IAC with several sub-claims (PCR/III 385-411) [See **ISSUE I** infra]; and,

IX, alleging inadequate mental health assistance (PCR/III 412-17).

(PCR/IV 570-73) The State had opposed an evidentiary hearing on Claim IV as insufficiently pled (PCR/III 493-95), and it did not oppose an evidentiary hearing on Claim IX to the extent it overlapped with IAC in Claim VIII (PCR/III 500).

At the January 2001 evidentiary hearing, Coleman's postconviction counsel, Ms. Laverde, called as witnesses –

Marie Wims, Coleman's aunt (PCR/V 611-40), who testified concerning aspects of Coleman's childhood;

Dolly Leverson (PCR/V 640-90), Coleman's mother who had testified at trial for Coleman in the guilt phase (R/VIII 1457-91) as well as the penalty phase (R/XI 2029-32);

Dr. Jethro Toomer, a psychologist (PCR/V 731-PCR/VI 822); and,

Ted Stokes, Coleman's trial counsel (PCR/V 691-730).

The State called as witnesses –

Dr. James Larson, a psychologist (PCR/VI 842-920); and,

Amanda Merrill (PCR/VI 839-40), who was called as a witness by the State in the guilt phase of the trial (R/VII 1285-R/VIII 1379).

The State will discuss details of the witnesses' testimony primarily under ISSUE I. However, the State notes at this juncture that when Stokes discovered that Amanda Merrill said that others at the murder scene referred to Coleman as "Mack or Max," Stokes inquired of Coleman, who told Stokes that he had never been known as "Mack or Mack George or Max." (PCR/V 695) A postconviction exhibit (DE #13), on which Dr. Toomer relied as Coleman's school records (PCR/VII 752-54), reflects Coleman's name as "Mack Connell George," "Mack George," and "Mack C. George" (PCR/VII 952-78).

Mr. Stokes felt that he was ready for trial (PCR/V 698-99), and Stokes pointed out that he was successful in obtaining a jury recommendation for life, and he indicated he did not think that the conditions in Liberty City would have swayed Judge Geeker. (PCR/V 722-23)

After counsel filed their closing-argument written memoranda (PCR/VIII 1205-1240), the Circuit Judge issued his Order Denying the Defendant's Motion to Vacate Judgments of Conviction and Sentences. (PCR/VIII 1285-1323). The Order summarized the proceedings to-date (PCR/VIII 1285) and elaborated on reasoning for denying, among others, the IAC claims (PCR/VIII 1286-89; 1292-96)[**ISSUE I**]; the withholding-exculpatory-evidence claims (PCR/VIII 1290-91) [**ISSUE VI**]; and the attempted felony murder claim (PCR/VIII 1297-98)[**ISSUE VII**].

Postconviction Atkins Evidentiary Hearing and Resulting Court Order.

On July 17, 2007, the Circuit Court conducted the evidentiary hearing on the Atkins mental retardation claim (PCR-S2/II 1072-1203) pursuant to this Court's remand (PCR-S2/I 926). At the State's request, the Circuit Court judicially noticed the prior trial and postconviction proceedings in this case. (See PCR-S2/II 1092)

Dr. Toomer testified (PCR-S2/II 1093-1124) again, as well as Dr. Larson (PCR-S2/II 1125-79). They discussed Coleman's previous postconviction 67 IQ score as well as the 49 IQ score from testing for the Atkins hearing. (PCR-S2/II 1116-17, 1131 et seq.) Toomer was unaware of any IQ testing on Coleman prior to his 18th birthday. (PCR-S2/II 1121) Dr. Larson was unaware

of any IQ tests other than the ones producing the postconviction 67 and 49 full scale scores. (PCR-S2/II 1176)

Dr. Toomer saw Coleman on June 7, 2007, when Coleman complained of back pain. (PCR-S2/II 1100-1103) For purposes of the Atkins proceedings, Dr. Larson saw Coleman on April 24, 26, and 30, 2007. (PCR-S2/II 1183)

The doctors disagreed on whether Coleman is retarded. Toomer said that Coleman meets multiple criteria for mental retardation and referenced Coleman's prior full-scale 67 IQ score. (PCR-S2/II 1107-1108) Toomer affirmed that he accepted Coleman's answers and his mother's answers in his testing. (PCR-S2/II 1117) Dr. Larson concluded that Coleman does not meet Florida's definition of retardation. (PCR-S2/II 1145-46)

Drs. Larson and Toomer coordinated their testing to avoid the "practice effect," which can result in a second IQ score being artificially higher due to taking the first test. They also agreed that Coleman would be given the "TOMM Test" (Test of memory Malingering), which Larson explained. (PCR-S2/II 1130-31) Dr. Larson explained why that Dr. Toomer's 67 score was an "underestimate." PCR-S2/II 1131-36) An IQ score "is only as good as the client is motivated to put forth good effort." (PCR-S2/II 1164)

Concerning Coleman's intellectual capacity, Dr. Larson concluded that Coleman "was functioning in the low average range." (PCR-S2/II 1136; see also PCR-S2/II 1145) Dr. Larson concluded that "clearly" Coleman "doesn't meet the prong … on impaired adaptive functioning." (PCR-S2/II 1145)

Dr. Toomer's (PCR-S2/II 1195-98) and Dr. Larson's (PCR-S2/II 1183-90) reports and Escambia County Jail records (PCR-S2/II 1193-1203) were introduced into evidence.

On August 1, 2007, the Circuit Court entered its Order Denying the Defendant's Motion to Vacate Judgments of Conviction and Sentences. (PCR-S2/III 1311-96) The Order detailed evidence at the Atkins hearing as well as the original trial proceedings. (PCR-S2/III 1313-21) The Circuit Court concluded that "Defendant has failed to demonstrate that he is or was mentally retarded…." (PCR-S2/III 1321) The Order noted that Coleman had waived his appearance at the Atkins hearing in writing, that at the beginning of the hearing Coleman's counsel (Mr. Brody) indicated he was not asserting Coleman's incompetence, and that the Court was satisfied that Coleman competently waived his appearance. (PCR-S2/III 1311 n.1 and accompanying text) [**ISSUE IV**]

SUMMARY OF ARGUMENT

Coleman raises seven issues. None of them justify reversing the trial court's denial of postconviction relief.

Coleman's trial counsel, Ted Stokes, did a constitutionally effective job, especially given Coleman's articulate testimony presenting his alibi defense. There is no IAC at the penalty phase. At trial, on the witness stand Coleman engaged in long narratives and invoked terminology like "disassociate[ing]" himself. He calculated figures on-the-fly, and contrary to any image of a loner, he had a fiancé and multiple girlfriends on whom he bestowed gifts. He played at a very high level of basketball, and no one

could beat him playing cards. Coleman used his anti-social personality disorder well until he was caught in this case, where witnesses and Dr. Larson ended Coleman's gaming others and the system. These and other facts palpably belie Coleman's claim to mental retardation and other hindsighted childhood and mental deficiencies. [**ISSUE I, ISSUE IV**]

Contrary to Coleman's claim [**ISSUE III**], Coleman is not like co-defendant Ronald Williams and does not merit a life sentence like Williams'. Williams was not at the mass-murder scene; Coleman was there participating in its HAC-saturated creation, as for example, he raped Ms. Merrill three times and personally slashed her throat three times and apparently raped Mildred Baker moments before she begged for her life and was shot dead.

Coleman's other claims also are insufficient. The trial judge did not reversibly err by excluding evidence that would have irrelevantly slurred the reputation of a member of the Bar. [**ISSUE II**] There is no cognizable claim of IAC of postconviction counsel [**ISSUE IV**], and Coleman's postconviction counsel observed him shortly prior to the Atkins evidentiary hearing and explicitly indicated to the trial court that he is not asserting that Coleman was incompetent to proceed. [**ISSUE IV**]

Coleman's counsel did not move to disqualify Judge Geeker, who lawfully re-appointed Mr. Harrison using language that the statute and this Court has required and who was not subjected to any improper ex parte communication. [**ISSUE V**] There were no Brady violations. The records that postconviction counsel failed to present to the trial court and that were

available to the public showed nothing material. [**ISSUE VI**] Finally, Gray does not apply retroactively. The Attempted First Degree Murder remains a lawful conviction. [**ISSUE VII**]

ARGUMENT

ISSUE I - IAC/PENALTY PHASE: HAS APPELLANT MET HIS BURDENS OF DEMONSTRATING THAT TRIAL COUNSEL WAS STRICKLAND DEFICIENT RESULTING IN STRICKLAND PREJUDICE IN THE PENALTY PHASE? (IB 41-57, RESTATED)

ISSUE I (IB 41-57) claims that the Circuit Court erroneously rejected the postconviction claim alleging that Coleman's counsel was unconstitutionally ineffective ("IAC") in the penalty phase of the trial. This claim was essentially presented to the trial court in the postconviction motion as CLAIM VIII (PCR/III 385-411). The trial court's order (PCR/VIII 1285 et seq.) denying this claim merits affirmance.

A. Coleman's Strickland Burdens.

Coleman must meet the rigorous tests of Strickland v. Washington, 466 U.S. 668 (1984). "[B]ecause the *Strickland* standard requires establishment of both prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001).

For the **deficiency prong**, the standard for counsel's performance is "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. "Judicial scrutiny of counsesl's performance must be highly deferential." Stein v. State, 995 So.2d 329, 335 (Fla. 2008), quoting Strickland, 466 U.S. at 689. "[C]ounsel is strongly presumed to have

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

"The object of an ineffectiveness claim is not to grade counsel's performance." 466 U.S. at 697. "[O]missions are inevitable." Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc). "[T]he issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" Id. at 1313, quoting Burger v. Kemp, 483 U.S. 776 (1987). The standard is not whether counsel would have had "nothing to lose" in pursuing a defense. See Knowles v. Mirzayance, 2009 U.S. LEXIS 2329, Slip op. No. 07-1315, March 24, 2009.

Coleman must establish that his counsel's performance was "so patently unreasonable that no competent attorney would have chosen it," Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997)("trial counsel's decision to forgo Watson's testimony"). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689.

Applying Strickland's principles to the penalty phase, defense counsel is not required to present every available mitigation witness to be considered effective. See Bell v. Cone, 535 U.S. 685, 696-98 (2002)(not ineffective where defense counsel presented no mitigating evidence in the penalty phase). Accordingly, Grayson v. Thompson, 257 F.3d 1194, 1225 (11th Cir. 2001), explained that a failure to find more of the same type of mitigation is not unconstitutionally deficient:

> 'A failure to investigate can be deficient performance in a capital case when counsel totally fails to inquire into the defendant's past

> or present behavior or life history.' *Housel v. Head*, 238 F.3d 1289, 1294 (11th Cir. 2001). However, counsel is not required to investigate and present all mitigating evidence in order to be reasonable. *See Tarver v. Hopper*, 169 F.3d 710, 715 (11th Cir. 1999).

For the **prejudice prong**, the reviewing court analyzes IAC-penalty-phase claims to determine whether the allegedly "'missing' testimony is significant enough to 'undermine [[its]] confidence in the outcome' of" the defendant's sentencing, "*Strickland*, 466 U.S. at 694, not to ask whether it would have had 'some conceivable effect on the outcome of the proceeding,' *id*. at 693. Our confidence in the outcome is not undermined." Cade v. Haley, 222 F.3d 1298, 1305 (11th Cir. 2000). Hannon v. State, 941 So.2d 1109, 1134 (Fla. 2006), indicated that the analysis includes "reweigh[ing] the evidence in aggravation against the totality of the mental health mitigation presented during the postconviction evidentiary hearing to determine if our confidence in the outcome of the penalty phase trial is undermined."

On appeal, the trial court's factual findings are presumed correct and merit affirmance if supported by competent, substantial evidence. See, e.g., Ford v. State, 955 So. 2d 550, 553 (Fla. 2007)("Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo"), citing Sochor v. State, 883 So.2d 766, 771-72 (Fla. 2004).

B. Postconviction IAC-penalty phase evidence pales in contrast to trial court's Order and evidence supporting it.

Experienced trial defense counsel Ted Stokes managed to avoid the likely **harmful** effects of Coleman's postconviction evidence on the penalty-phase outcome. By the time of his appointment to represent Coleman, Mr. Stokes had done "[p]robably five murder trials and two capital" trials. (PCR/V 693) Because Mr. Stokes' was "an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." Chandler, 218 F.3d at 1316; see also Burger v. Kemp, 483 U.S. 776, 779-81 (1987) (reciting and referencing counsel's extensive credentials in opinion finding that counsel rendered effective assistance). "Experience is due some respect." 218 F.3d at 1316 n.18. The trial court's Order was properly deferential to Mr. Stokes' strategy to humanize Coleman.

Trial Court's Order denying IAC penalty-phase claim.

The Circuit Court's analysis of this IAC penalty phase claim focuses on trial defense counsel's humanizing theme mandated by Coleman's palpable intelligence and Coleman's witness-stand demeanor and testimony. It is supported by competent, substantial evidence, meriting affirmance:

> In his second subclaim, the Defendant alleges that defense counsel failed to investigate 'first and second stage evidence'.[fn8] Specifically, the Defendant alleges that counsel was ineffective for failing to conduct an adequate pretrial investigation. At the evidentiary hearing, the Defendant's trial counsel, Mr. Stokes, testified that he conducted 'a lot of depositions', and went to Miami and personally talked with all of the alibi witness provided by the Defendant.[fn9] **Mr. Stokes also testified that he spoke with the Defendant's family about the Defendant's past and background in Liberty City.** The Defendant has failed to show how his counsel's preparation was deficient, and fails to allege that there was a reasonable probability that the outcome would have been different had

counsel prepared or investigated more. Accordingly, the Defendant is not entitled to relief on this claim.

In his third subclaim, the Defendant alleges that defense counsel was ineffective for failing to present mitigating evidence or evidence contradicting the State's aggravating circumstances. At the evidentiary hearing, Mr. Stokes testified that his trial strategy was to focus on the guilt phase, and to **paint the Defendant as a normal individual who was not capable of murder and not the killer.**[fn10] Mr. Stokes testified that in his professional opinion, presenting the Defendant's 'Liberty City background **and all of the drugs ...** would lead the jury to believe he was capable of it.'[fn11] Further, Mr. Stokes testified that because the jury recommended against the death penalty he believed his strategy worked. Mr. Stokes testified that he did not believe presenting mitigating evidence of the Defendant's childhood and background or mental state would have made a difference to the Court.[fn12] Strategic decisions made by counsel which are reasonable under the norms of professional conduct do not constitute 'ineffective assistance of counsel.' *See Schwab v. State*, 814 So.2d 402[] (Fla. 2002). Furthermore, a strong presumption exists that the challenged action constitutes sound trial strategy on the part of the defense. '[D]efense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected.' *Spencer*, 842 So. 2d at 62. [Spencer v. State, 842 So.2d 52, 62 (Fla. 2003)] The Court finds that the Defendant has not overcome this presumption and shown that trial counsel's performance was unreasonable.

***

Fifth, the Defendant alleges that defense counsel was ineffective for failing to request a mental health expert on behalf of the Defendant. At the evidentiary hearing, Mr. Stokes testified that he believed the **Defendant was 'very intelligent', streetwise, and mentally competent.[fn13] Accordingly, Mr. Stokes, based upon his assessment of the Defendant, decided that calling a mental health expert to testify was not necessary.**

Based upon the Defendant's trial testimony and performance under cross examination, as well as Mr. Stokes' testimony that he believed the **Defendant was bright, competent and intelligent**, the Court finds that the Defendant has failed to meet his burden of showing that counsel's performance was deficient in any way. *See Strickland v. Washington*, 466 U.S. at 689 (1984) (holding that Courts should 'eliminate the distorting effects of hindsight' in evaluating an attorney's performance).

fn8 See Defendant's Motion, p. 37.

fn9 See Evidentiary Hearing Transcript, Vol. I, p. 96, attached.

fn10 See Evidentiary Hearing Transcript, pgs. 123-124, attached.

fn11 See Id. at 13l.

fn12 See Id. at 124.

fn13 See Evidentiary Hearing Transcript, pgs. 119-120, attached. Mr. Stokes also testified that the **Defendant answered questions logically and coherently when questioned by the prosecutor under cross-examination.** Id. at 130.

(R/VIII 1292-94) See also trial court's discussion of Dr. Toomer and Dr. Larson, R/VIII 1295 (e.g., " Dr. Larson concluded that the Defendant had **antisocial personality disorder**").

As the trial court indicates, Mr. Stokes met with, and relied upon, Coleman's family for background information on Coleman. He extensively prepared for trial. He took many depositions and personally went to Miami and talked with Coleman's mother, his girlfriend Mary "Toots" (Tookes, see R/VIII 1451) "at the time," and Cassandra Pritchett. (PCR/V 694-95). Stokes relied on Coleman's girlfriend and mother "in developing mitigating circumstances." (PCR/V 721) He also relied on them for records. (See PCR/V 707-708) "Ms. Toots was pretty helpful in trying to find some information …." (PCR/V 708) When he went to Miami, Mr. Stokes observed "horrendous" conditions in Liberty City. (PCR/V 697, 725) He had also talked with "an expert from the University of Florida." (PCR/V 706-707; see also R/XI 1982-83)

Defense counsel Stokes' reliance upon Coleman's mother and fiancé is buttressed by Coleman's postconviction evidence relying upon the mother again. (See PCR/V 640-87) Coleman's family's hindsighted ability to produce

some more details years after the trial does not render Stokes' performance unreasonable and deficient under Strickland. See Chandler, 218 F.3d at 1314 ("To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable").

Trial defense counsel, Mr. Stokes, testified at the evidentiary hearing that his trial strategy was mandated and dictated by Coleman's position asserting his alibi and acknowledged that he wanted to present an image of Coleman "as normal of a human being as possible." (See PCR/V 721-22; see also PCR/V 694-95) Stokes sought to avoid using evidence such as drug use because that "would lead the jury to believe that he was capable of" murder. (PCR/V 729) Similarly, an expert on developmental disability "might lead someone to believe he was" capable of killing someone. (PCR/V 730)

Counsel explained that he "really didn't see any mental defects in Michael Coleman." (PCR/V 697) "I considered him to be intelligent, smart, at least a street-smart." (PCR/V 707) Stokes did not see any reason to seek an expert's opinion on Coleman's medical conditions because he "was certainly bright and intelligent," "intelligent enough" to convince Stokes of his alibi defense. (PCR/V 719) Accordingly, Coleman "communicate[d] with trial defense counsel and "remember[ed] events," including presenting an alibi that defense counsel believed at the time. (PCR/V 717-20)

Although Stokes "concentrated on the guilt/innocence phase more than the penalty phase," (PCR/V 723-24) preparation for the two phases overlapped. Choosing a theme of humanizing Coleman as "normal" (that is, as

normal as he could be portrayed) enabled defense counsel to, in the 1989 trial –

- Display on the witness stand (See R/VIII 1492-1518; R/XI 2032-36) Coleman's intelligence as worth saving; thus,
    - Coleman had no problem understanding questions;
    - Coleman's answers were responsive to the questions, including adapting to cross-examination questions;
    - Coleman provided many understandable, lengthy, narrative answers to questions, such as the nine lines of testimony at pp. 1494-95, five lines of testimony at p. 1496, nine lines of testimony at p. 1496, almost an entire page of narrative testimony at p. 1497, about a page of narrative testimony at pp. 1502-1503;
    - On cross-examination, while Coleman could not recall the name or address of a motel, he explained how he was able to find it: Head South from his house "down 67 and hit 95," then go over to downtown, the "[a]ddress was on the key, on the handle of the key" (R/VIII 1507); he said he was given the key the 19th of September (R/VIII 1509);
- Facially support Coleman's alibi through Coleman's trial testimony recalling many events (See R/VIII 1492-1518; R/XI 2032-36);
- Display on the witness stand Coleman's demeanor as normal-looking and therefore worth saving, versus a stereotypical sociopath;
- Consistent with showing his intelligence and relative normalcy, display Coleman's vocabulary and concepts like "a female associate of mine" (TT/VIII 1495 L16); "I just disassociated myself with her" (TT/VIII 1496 L23-24); "Excuse me if I'm offending any females" (TT/VIII 1500 L18);
- Consistent with showing his intelligence and relative normalcy, display at trial Coleman's ability to "convert numbers in his head" concerning "computations of values of money" (PCR/VI 871; see R/VIII 1500-1501)
- Persistently argue that these murders were out of character for Coleman (See R/XI 2075-82; R/XIV 2482-93, 2615-17);
- Highlight the limited scope of the evidence that Coleman was linked to "any major cocaine trafficking organization " (See R/XIV 2491-92); and,

- Continue to attempt to advance, through Coleman and his mother, the theme of lingering doubt (See R/XI 2032-35, 2031-32).

Accordingly, Coleman's basketball prowess (See R/XI 2030) demonstrated normalcy.

Thus, at the penalty-phase trial, Mr. Stokes called Dolly Leverson, Coleman's mother (See R/VIII 1457-58), as a witness. (R/XI 2029) She testified at trial that she lived in the projects of the Liberty City area of Miami while Coleman was growing up. (R/XI 2030) Coleman "went to the 10th grade" in school. (R/XI 2030) He was one of "the best" basketball players to the point where "mostly all the scouts that came to the games wanted him to play for them." He was "one of the best players they had ever seen." (R/XI 2031) She said that Coleman is not a violent person and that he could not kill anyone, elaborating that "he has to be pushed … to get angry." (R/XI 2031-32) She knew that Coleman was not in Pensacola on September 19th and 20th. (R/XI 2031) There was no cross-examination. (See R/XI 2032)

Coleman testified at the penalty phase. (R/XI 2032) He reiterated his alibi and said that he has been "found guilty of some crimes I know nothing about." (R/XI 2033) He said his blood did not match. His testimony included long narratives. (See R/XI 2033-34)

Coleman's counsel, Mr. Stokes, argued for a life recommendation from the jury. He discussed the role of the jury and weighing mitigation. "You can find that any number of mitigating circumstances are sufficiently strong to overcome any number of aggravating circumstances." (R/XI 2076) As mitigation, he argued victims' involvement in the cocaine business and with

cocaine use (R/XI 2076-77) and Coleman's relatively minor role, including evidence showing that Coleman did not shoot anyone (R/XI 2077-80) and Timothy Robinson's leadership role at the murder scene (R/XI 2079-80). He focused on Coleman's Liberty City childhood environment:

> You can consider the environment that he grew up in down in Liberty City, right in the heart of Liberty City from 62nd Street and 20th Avenue down there right in the projects. You can consider what he grew up in and what he was trying to get away from.

(R/XI 2081)

Mr. Stokes argued Coleman's non-violent personality and basketball prowess. (R/XI 2080-81)

Over an overruled prosecution objection (R/XI 2079), Stokes also reiterated Coleman's innocence and then requested the jury to consider it versus the finality of the death penalty (R/XI 2078-79, 2081-82).

Stokes effective efforts yielded a jury recommendation of life in prison (R/XI 2096).

On July 25, 1989, the Circuit Court, sitting without jury, resumed the sentencing phase. (R/XIV 2478-2508) Coleman's counsel referenced his sentencing memorandum. (R/XIV 2482, 2488-89) The Memorandum in Opposition to Imposition of the Death Penalty discussed the applicability of case law concerning jury overrides, evidence that Coleman was not the triggerman, and mitigation evidence. (R/XIV 2615-17)

At the sentencing hearing, Mr. Stokes argued for Coleman that the judge should follow the jury's life recommendation, that Coleman was not the triggerman (in terms of the gunshots), emphasized Merrill's testimony that she did not think Coleman shot anyone, and contended that Coleman's

participation was relatively "slight" and he was not one of the leaders at the crime scene. (R/XIV 2482-2490) Mr. Stokes also highlighted the testimony from Coleman's mother and fiancé "that he was a kind and gentle person, that he wouldn't hurt anybody, and that he assisted his mother substantially in every way he could." He focused on the "bad conditions" in Liberty City in which Coleman grew up and Coleman's "redeeming qualities." (R/XIV 2490-92) Mr. Stokes also argued that the "victims … had some involvement in the crimes themselves." (R/XIV 2492-93)

In sum, Mr. Stokes was able to "paint the Defendant as a normal individual who was not capable of murder and not the killer," which comported with Coleman's insistence that he did not do the shooting. Indeed, the reasonableness of Stokes' actions was substantiated by the jury's life recommendation, which also buttresses the conclusion that Coleman's postconviction evidence failed to show the requisite Strickland prejudice.

As the trial court found, defense counsel Stokes' experienced-informed preparation, observations, tactics, and actions were reasonable, not Strickland deficient.

Coleman's postconviction evidence ranging from non-existent to weak to detrimental to Coleman's cause.

The gravamen of Coleman's postconviction evidence from his mother and aunt did not substantially extend beyond the humanizing efforts his trial defense counsel had tendered to the sentencing Court. (See preceding section; R/XI 2029-32, 2079-82; R/XIV 2484-2493, 2615-17)

In contrast to Mr. Stokes' humanizing theme that comported with what jurors and the trial judge saw of Coleman on the witness stand, the postconviction evidence --

- **lacks documentary and other support** for this IAC claim

and portrays Coleman

- negatively as a **mother-deceiving**
- **polysubstance abuser**;
- negatively with **antisocial-personality disorder**;

and corroborates incriminating trial evidence showing

- these mass murders initiated as a **drug-hit** and
- Coleman as the **"Max"** or **"Mack"** who, among other heinous acts, **raped Amanda Merrill three times and slit her throat three times.**

Even with years of hindsight to gather additional penalty-phase evidence after the trial, the presentation of Coleman's postconviction evidence to the jury and the sentencing trial judge would have affirmatively harmed the argument for life. The State elaborates.

It is noteworthy what Coleman did **not** produce at the postconviction evidentiary hearing on the IAC claim. Although Coleman, through postconviction counsel, introduced into evidence Coleman's school records (See PCR/VII 952-78), he produced no mental health records, other than Dr. Toomer's records generated for the postconviction proceedings (See PCR/VI 941-49). Coleman's mother testified as to hearsay that she was told that her son was knocked unconscious while in prison (See PCR/V 675-76), but at the evidentiary hearing Coleman produced no medical records or prison mental health records (See Defense Exhibits at PCR/VI 939-49; PCR/VII;

PCR/VIII 1145-68; see also Coleman's written summaries of his postconviction evidence in memoranda at PCR/VIII 1205-1212, 1235-40).[2]

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[2] If Coleman asserts that his postconviction counsel was not provided with pertinent DOC or other records, the State responds that his Initial Brief frames the issues, public records were not raised as a claim in the Initial Brief, and the State objects to any attempt to raise public records in a Reply Brief. See Jones v. State, 966 So.2d 319, 330 (Fla. 2007)("In his reply brief, Jones raises for the first time a claim that ... the trial court abused its discretion by ... "; "we need not address it"); Whitfield v. State, 923 So.2d 375, 379 (Fla. 2005)("we summarily affirm because Whitfield presents merely conclusory arguments"); Hall v. State, 823 So.2d 757, 763 (Fla.2002) ("Hall made no argument regarding equal protection in his initial brief; thus, he is procedurally barred from making this argument in his reply brief."); Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence ... bare claim is unsupported by argument); Sweet v. State, 810 So.2d 854, 870 (Fla. 2002)("Sweet simply recites these claims from his postconviction motion in a sentence or two"; unpreserved). Moreover, at this juncture the State also notes that there was extensive litigation concerning public records, during which the Circuit Court essentially found that Coleman's initial postconviction counsel had obtained the Fla. DOC records he requested, including any records referencing tests and psychological evaluations. Further, the Circuit Court afforded postconviction counsel extensions for seeking additional DOC records. Thus, in its post-evidentiary hearing Order, the trial court again rejected a records-claim and found that Coleman failed "to show the relevance" of any records that were not produced. (PCR/VIII 1289) In an abundance of caution, the State elaborates on background.

In May 1997 Coleman's postconviction counsel Rollo requested public records from the Dept. of Corrections and included a request from Fla. DOC for all "test results" and "psychological reports." (PCR-S/II 344-46) In February 1999, the Circuit Court found that "[a]ll public records requests to date have been complied with" (PCR-S/III 441). In an April 1999 order, the Circuit Court indicated that in February 1999, Coleman's postconviction counsel represented that all previously requested public documents had been furnished. The April 1999 order also quashed an additional public records demand of DOC but invited Coleman's postconviction counsel to file an affidavit certifying that she conducted a diligent search of previously-provided records and that specific additional records exist but have not been provided. (PCR-S/III 468-71) In June 1999, the Circuit Court found that postconviction counsel had not filed such an affidavit and provided an additional 30 days to file one. (PCR-S/III 478-79)

In August 1999, Coleman's postconviction counsel referenced "the volume of records" at the repository. (PCR-S/III 522) In August 1999, Coleman's postconviction counsel's only indication of an outstanding public records request of DOC pertained to a pending request for information regarding "147 specified persons," but it did not complain that Coleman's DOC medical and psychological records were unprovided. (See PCR-S/III 537-38)

In September 1999, the Circuit Court summarized some of the public records proceedings and afforded postconviction counsel another additional opportunity to obtain supplementary records from DOC. (PCR-S/III 548-51)

In October 1999, Coleman's postconviction counsel filed a demand for supplemental public records on DOC, requesting DOC records on four listed individuals but not on Coleman himself. (PCR-S/IV 624-26) In November 1999, the Circuit Court summarized the public records proceedings and quashed the demand on DOC because of a failure to specify how the records were relevant. (PCR-S/IV 649-53) In November 1999, Coleman's postconviction counsel filed motions for costs that listed 22 hours of records review (See PCR-S/IV 654-58) and nine hours of record review (PCR/IV 661-65). (See also PCR/IV 675, 694-95)

Subsequently, Coleman's February 2000 postconviction motion complained about not receiving DOC records regarding 147 persons, but he did not allege that DOC records on Coleman himself were withheld (See PCR/III 365); Claims VIII and IX contained some generic not-all-records-have-been-received-and reviewed language but did not specifically mention any DOC medical or psychological records on Coleman (See PCR/III 386, 416-17; see also PCR/III 349-50). The State outlined additional details of the public records events and pleadings in its Response to Coleman's postconviction motion. (See PCR/III 458-63) At the July 2000 Huff hearing, Coleman's counsel did not complain about any missing DOC records on Coleman's mental health (See PCR/IV 519-68), but when the evidentiary hearing convened, she complained that some of Coleman's DOC records were missing (PCR/V 604-605), the State responded that it is too late to be raising this matter (PCR/V 606), and the Court ruled that the evidentiary hearing will be confined to those matters on which the Court granted an evidentiary hearing in its Huff order. (PCR/V 607) In light of the prior proceedings in which Coleman's postconviction counsel received voluminous records and was afforded many opportunities over many months to pursue additional records upon a reasonable specific showing, the Circuit Court's ruling was imminently reasonable. See, e.g., Moore v. State, 820 So. 2d 199, 204-205 (Fla. 2002)("Given Moore's own delays in reviewing available records and his failure to comply with the requirements of Florida Rule of Criminal Procedure 3.852(i) regarding requests for additional public records, we find that the trial court did not abuse its discretion in rejecting Moore's requests for additional public records"); Carroll v. State, 815 So. 2d 601, 609 (Fla. 2002)(public records claim rejected as "conclusory" and "trial

Coleman's postconviction motion had alleged that "as a result of his [hearing] impairment, Michael failed every subject in the second grade" and suggested that, as a result, he was "below average in every subject from 1971 to 1973" and "never improved," (PCR/III 399-400), but other than one test result (See PCR/VII 957[3]) and possibly Coleman's widely varying grades, the State has found no evidence in the record that Coleman was hearing-impaired. Trial defense counsel had no problems communicating with Coleman (See PCR/V 717-19), and Coleman exhibited no hearing (or any other) problem when he testified twice at his trial. (See R/VIII 1492-1518; R/XI 2032-37)

In contrast, Coleman was able to obtain some C's, B's, and A's in some subjects as late as 1978 (See PCR/VII 958, 960, 967, 975); his mother said he was an "average child" (PCR/V 663) until his father died in 1972 (See PCR/VII 1002); a hearing (or any other) deficit did not impair his ability

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court held several hearings as to Carroll's public records requests and expressly concluded that all matters relating to his requests had been settled"); Rodriguez v. State, 919 So. 2d 1252, 1273 (Fla. 2005)("defendant must plead with specificity the outstanding public records he seeks to obtain"), citing Johnson v. State, 769 So. 2d 990, 995-96 (Fla. 2000) and Thompson v. State, 759 So. 2d 650, 659 (Fla. 2000). (The State notes that even at the 2007 Atkins hearing, Coleman introduced some 2007 jail records, which fail to timely and substantially support his IAC claim; they referenced blood pressure "problems" and self-reports of nausea, dizziness, and confusion and show that Coleman was refusing his medications and complaining about his treatment. See DE #3 at PCR-S2 1199-1203)

[3] The handwriting is barely legible but it appears to state "failed audiometer test." (PCR/VII 957) The date is not legible on the State's copy, but it was written on records West Little River school (See PCR/VII 956), where Coleman attended 1967-1969 (See PCR/VII 954); compare PCR/VII 956 with PCR/VII 958)

to deceive his mother into thinking he was at school (See PCR/V 661, 667, 674) and conceal from her his chemical-huffing ways (Compare Coleman "average" until about age 12, PCR/V 662-63, with sniffing chemicals at age seven or eight, PCR/V 745); a hearing (or any other) deficit did not impair his unbeatable gambling ability to the point of cleaning-out gambling competitors and making a living playing cards (R/VIII 1462, 1501-1502, 1511, 1521) and playing a very high level of basketball (R/XI 2031; PCR/V 638-39, 657, 664); and, he appeared to hear fine and otherwise function when he was at the mass murder scene as a full participant using the name "Max or "Mack" (See R/VII 1293-1307; R/VIII 1359-61).

Coleman also argues (E.g., IB 53) that his school records show that he was assigned to special education classes, but Dr. Larson questioned that interpretation of Coleman's records (PCR-S2/II 1149-50), and the record is saturated with evidence of Coleman's street-wise intelligence, as discussed several times in this issue. Therefore, Dr. Larson testified that special-ed classes would have made no difference in his opinion of Coleman's intelligence. (PCR-S2/II 1174, 1175)

Indeed, the State submits that no probative evidence was introduced to substantiate the claim that the inception of Coleman's failing grades, hostility, deceit, polysubstance abuse, and crime (See PCR/V 660-64, 667-69, 674-77) was caused by the 1972 (PCR/VII 1002) death of his father, when Coleman was about age 11 (See DOB of 1961, R/XIV 2608; PCR/VII 952-70, 971-78)). Instead, even though Coleman's mother thought he was "average" at the time (See PCR/V 662-63), "at age seven or eight" Coleman was already

abusing "alcohol and cocaine" and sniffing chemicals (PCR/V 745) and in 1970 at about age nine Coleman was already having behavioral problems in school (See checks in school records at PCR/VII 959), and after his father died in 1972, Coleman was obtaining some A's, B's, and C's grades in 1973-1974 (PCR/VII 967) and 1977-1978 (PCR/VII 975). Accordingly, Dr. Larson testified that Coleman's 7th grade school records showing test results "higher than we would expect if [Toomer's] IQ score were accurate representations." (PCR/VI 867-69)

The death of Coleman's father supposedly resulted in Coleman turning more inward, becoming even more quiet. (PCR/V 634) However, if this evidence had been introduced at the penalty phase, it would have been contradicted by evidence that Coleman had "several girlfriends" (PCR/V 679); the status of his witness Ms. Tookes, as his fiancé (R/VIII 1451) who testified for him at trial (R/VIII 1451-57); his "going with" Ms. Pritchett (R/VIII 1496), going with her to a motel (R/VI 1149-50), giving her about $600 to $700 to assist in getting her transmission fixed (R/VIII 1496), and giving her jewelry stolen at the murder scene (R/VI 1148-49; R/VII 1170-74; R/VII 1305-1306); and, his providing $1200 of financial assistance for Deedee's apartment (R/VIII 1500-1501).[4] Indeed, Coleman's trial testimony is anything but shy, and Coleman testified at trial that he is "not a follower" (R/VIII 1502 L9-10).

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[4] Coleman testified, "She messed $700 up and I took $500 back because she never did go get the apartment." (R/VIII 1501)

Perhaps if Coleman had attended school, instead of deceiving his mother into thinking he was there, (PCR/V 661, 667, 674) his grades would have been consistently higher. This deception also buttresses the image of a life-long wily person who applied his street-intelligence (PCR/V 707) to not only making a living from gambling (R/VIII 1501-1502, 1511; see also R/VIII 1462) and growing a dollar stake into cleaning out the competition (R/VIII 1521: "he broke them"), but also to even substantially less honorable pursuits when it suited Coleman. (See also discussion of anti-social personality disorder infra)

Coleman also argues (IB 52-53) that his trial defense counsel was Strickland ineffective by failing to elicit in the penalty phase evidence that an insurance agent sexually molested Coleman. However, the postconviction testimony on this matter consists of Coleman's mother's testimony indicating that she "found out after he had died" that "he had been molesting my child." (PCR/V 670-71) The evidence failed to specify the molestation and failed to specify how and when the mother became aware of it. Coleman's mother's testimony failed to show that the mother knew of the "molestation" prior to the sentencing of Coleman to death, failed to show that Coleman's trial counsel ineffectively failed to elicit the information from the mother, and failed to show that available, admissible, and probative evidence existed at the time of trial to prove the molestation. Indeed, the State has not found where Coleman's aunt testified to any aspect of the alleged molestation. (See PCR/V 611-40)

Coleman's postconviction evidence did not show that he was exclusively raised in the Liberty City area. Instead, Coleman partially grew up there at his grandmother's residence, but also partially grew up in "Brown Sub" (PCR/V 646-47), which could have[5] undermined defense trial counsel's Liberty City argument to the Circuit Judge. Further, the trial court's sentencing order found that even if Coleman's Liberty City upbringing were considered, it would not outweigh the aggravating factors (See R/XIV 2613).

Coleman's postconviction evidence portraying him as a polysubstance abuser (See PCR/V 668-69, 745) would have corroborated the link between him and the drug-related murder-mission in Pensacola and shown him in the unfavorable light as a committed doper, in contrast to trial defense counsel's attempt to humanize Coleman.

Moreover, the school records that Coleman introduced at the evidentiary hearing (DE #13), on which Dr. Toomer relied (PCR/V 752-54), reflects Coleman's name as "Mack Connell George," "Mack George," and "Mack C. George" (PCR/VII 952-78), which, at trial, would have corroborated surviving victim Amanda Merrill's trial testimony that the person she identified as Coleman, who raped her three times (R/VII 1300-1302, 1331-32) and cut her throat three times (R/VII 1303-1304, 1320, 1334), was referred to by accomplices as "Max or "Mack" (See R/VII 1293-1307; R/VIII 1359-61).

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[5] Coleman's mother described the riots, killings, and fires in response to a compound question. (See PCR/V 648-49) The mother did say, however, that Coleman would walk to school in the area and that a store where he was sent was "right across the street." "[H]e couldn't help but see it." (PCR/V 650)

Further, the probative value of Dr. Toomer, the only mental health expert to testify for Coleman at the postconviction evidentiary hearing, is undermined by never testifying as a witness called by the State in a death penalty case (PCR/VI 787-88); by not reviewing Coleman's or Amanda Merrill's trial testimony (PCR/VI 794-95); by not asking Coleman specific questions about what happened in the Fall of 1988 (the time of the murders) (PCR/V 761-62);[6] and, according to Dr. Larson,[7] by using test scores that were inapplicable or invalid (PCR/VI 872-86; see also PCR/VI 908-910) and by misdiagnosing Coleman as without antisocial personality disorder (Compare PCR/V 761; PCR/VI 817-20 with PCR/VI 853-61, 886-87, 890-96, 913). Further, a neutral facility, using Toomer's raw data, scored Coleman in Category or Type 16, which is "very, very similar to ... antisocial personality disorder[]." (PCR/VI 881-82)

Dr. Toomer opined at the postconviction proceeding that it is possible that Coleman has "organicity," but no neurophysiological evidence was offered to support this opinion. Instead, Dr. Toomer substantially relied on "testing" that relied on answers provided by Coleman (See PCR/VI 797-818, 905-906, 908-909, 916-19), who has a track record of deceit (PCR/VI 856-57; see PCR/V 661, 667, 674), gambling prowess (see R/VIII 1462, 1501-

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[6] Toomer appeared to ignore his own admonition to look at "all sources of information" (T 154).

[7] In contrast to Toomer, Larson has a balanced history of testifying for both the defense and State. (See PCR/VI 851-52) Unlike Toomer, Larson did not ignore trial testimony depicting the events of the murders (See PCR/VI 849-50) and subjected Toomer's test data to rescoring, including by a neutral scoring facility (See PCR/VI 878-84).

1502, 1511, 1521), and ability to calculate monetary amounts on-the-fly (R/VIII 1500-1501). Indeed, Dr. Toomer himself acknowledged the need for further testing regarding his "organicity" opinion: "Given these findings, a complete neuropsychological evaluation is strongly recommended to determine the nature and extent of any underlying organic impairment." (PCR/VI 944, underlined emphasis in original) Coleman failed to submit for the Circuit Court's consideration this "complete neuropsychological evaluation."

Indeed, the totality of Coleman's postconviction evidence would have opened the door to Dr. Larson's substantially damaging testimony (PCR/VI 856-59; see also PCR/VI 890-96) detailing how Coleman meets the criteria for antisocial personality disorder, including, for example:

- Coleman's "failure to conform to the social norms with respect to lawful behavior … clearly" exhibited by Coleman's "incarcerat[ion] numerous times as a juvenile and as an adult," including "this []as his third time in Department of Corrections" (PCR/VI 856);
- Coleman's "juvenile record that's replete with examples of misconduct, fighting, incorrigibility, not going to school, truancy" (PCR/VI 859); "the record is replete with physical fights and assaults"(PCR/VI 857);
- Coleman's "deceitfulness, as indicated, by repeated lying, use of aliases, conning others for personal profit and pleasure," including his "admitted … use[of] aliases, … he often told lies," and his deceiving his mother into thinking he was at school as "another example of that, pervasive pattern in this case starting early on in life" (PCR/VI 856-57);
- Coleman "making his living through criminal conduct" (PCR/VI 859);
- Coleman's actions at the mass-murder scene (See PCR/VI 858); and,
- Coleman's lack of remorse in this case (PCR/VI 859).

The totality of Coleman's postconviction evidence, even after several years of hindsight and research, at its best, pales in comparison to the

evidence and arguments Mr. Stokes marshaled, and in several respects Coleman's postconviction evidence would have substantially harmed Coleman. Insurmountable trial facts were Coleman's personal involvement at the mass murder scene, including his raping Amanda Merrill three times and personally slashing her throat three times. As such, at the postconviction evidentiary hearing, Coleman demonstrated neither Strickland deficiency nor Strickland prejudice.

Mr. Stokes' efforts produced a jury's life recommendation in spite of Coleman's brutal actions at the crime scene. Coleman's postconviction evidence would have even jeopardized that life recommendation.

C. Additional case law supporting trial court's Order.

Several additional cases support the denial of the IAC penalty phase claim and the rejection of ISSUE I.

Strickland itself supports Stokes' reliance upon his conversations with Coleman and building his penalty-phase defense around Coleman: "[I]nquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. Strickland, 466 U.S. at 691. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Id. See Reed v. State, 640 So.2d 1094, 1096-97 (Fla. 1994) ("when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful,

counsel's failure to pursue those investigations may not later be challenged as unreasonable"); Bryan v. State, 748 So.2d 1003, 1007(Fla. 1999) ("claim that his mental health experts and trial counsel lacked facts upon which to explore his alleged drug use, drinking problem, and sleep deprivation at the time of the crime is undermined by his own failure to provide such facts himself"). Here, Stokes did a reasonable and constitutionally effective job of harvesting mitigating evidence, given what Coleman and his family presented to him. Cf. Schriro v. Landrigan, 550 U.S. 465, 475 (2007)("If Landrigan issued such an instruction [to "his counsel not to offer any mitigating evidence"], counsel's failure to investigate further could not have been prejudicial under *Strickland*").

Mills v. State, 603 So.2d 482 (Fla. 1992), was a jury override like here. There, the trial court found "six aggravating circumstances: 1) under sentence of imprisonment; 2) previous conviction of violent felony; 3) great risk of death to many persons; 4) felony murder; 5) pecuniary gain; and 6) heinous, atrocious, or cruel [HAC]. The court had found that no mitigating circumstances had been established." Mills v. State, 476 So. 2d 172, 177 (Fla. 1985). On direct appeal, this Court upheld the aggravators of under sentence of imprisonment, previous conviction of violent felony based on an aggravated assault, and felony murder, but it struck pecuniary gain and HAC. 476 So.2d at 177-78. Thus, here the aggravation is substantially stronger than in Mills: HAC, CCP, and prior violent felony (including multiple murders and an attempted murder).

In Mills and here, in the penalty phase, defense counsel relied on family testimony to plead for life. Unlike here, in Mills, the defendant called "numerous witnesses at the 3.850 evidentiary hearing," 603 So.2d at 484. Mills' lay postconviction evidence overlapped the evidence presented in the penalty phase, with "Mills' sister who testified at trial and one of his brothers also testified. They recounted growing up in poverty with parents who did not function as parents and how Mills had suffered two head injuries as a child." 603 So.2d at 484. Here, Coleman's mother's postconviction testimony overlapped her penalty-phase testimony.

Mills involved less preparation for the penalty phase than here, but like here, defense counsel essentially indicated that "nothing about [the defendant] suggested a mental health examination was needed," Id. Defense counsel "had no reason to suspect that any mental health mitigating evidence could be developed," Id. at 485. A "defendant's mental condition is not necessarily at issue in every criminal proceeding." 603 So.2d at 485, quoting Ake v. Oklahoma, 470 U.S. 68, 82 (1985). See also Duckett v. State, 918 So. 2d 224, 237 (Fla. 2005)(rejected claim "that trial counsel was ineffective for failing to obtain and present psychological testing at the penalty phase"; "trial counsel had no reason to suspect that any mental mitigating evidence could be developed").

There, two psychologists testified at postconviction to substantially more mitigating evidence than Dr. Toomer's weak and contradicted evidence here. Indeed, here the mental health evidence revealed at postconviction would have affirmatively damaged Coleman's plea for a life sentence.

In Mills and here, defense counsel's "effectiveness in securing a jury recommendation of life imprisonment cannot be overlooked," 603 So.2d at 485.

Thus, as in Mills, here there is no Strickland prejudice, that is, no "reasonable probability that the currently tendered evidence would have produced a reversal of the judge's override of the jury's recommendation," 603 So.2d at 486. Indeed, in Mills, the implication for "abrogate[ing] the judge's override of the jury recommendation" was "speculative," Id., whereas here the totality of Coleman's postconviction evidence would have provided additional weight supporting the override.[8]

Accordingly, Mills v. Singletary, 161 F.3d 1273, 1284-86 (11th Cir. 1998), reviewed the same death sentence that this Court upheld in Mills, 603 So.2d 482 (Fla. 1992). The Eleventh Circuit rejected the federal claims of "ineffective assistance because: (1) both [counsel] failed to investigate mitigating evidence and to prepare for their respective proceedings; and (2) both failed to have a mental health evaluation of Mills performed, and failed to argue mental health issues as mitigating evidence." Mills held that the defendant failed to establish the deficiency prong even though the public defender's office waited until the Saturday prior to the Monday penalty phase to hire penalty-phase counsel and even

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[8] Subsequently, the Circuit Court gave Mills a new sentencing phase based on a different claim that "newly discovered evidence established the codefendant, and not Mills, was the triggerman in the underlying murder …." See State v. Mills, 788 So.2d 249, 250 (Fla. 2001).

though penalty phase counsel testified that "with the benefit of hindsight mental health evidence should have been looked at." 161 F.3d at 1285, 1286.

Tarver v. Hopper, 169 F.3d 710 (11th Cir. 1999)(Ala.), like here, was a jury override case. There and here, the reasoned primary focus of defense counsel was on the guilt phase and counsel argued residual doubt in the penalty phase. The Eleventh Circuit's reasoning applies here: "A lawyer's time and effort in preparing to defend his client in the guilt phase of a capital case continues to count at the sentencing phase. Creating lingering doubt has been recognized as an effective strategy for avoiding the death penalty." 169 F.3d at 715. While in Tarver, defense counsel interviewed more family members, Stokes' interviews included the pivotal witness on whom Coleman relied in the postconviction evidentiary hearing, his mother. It is not a numbers contest. The Eleventh Circuit was "unpersuaded by the admission (during state collateral proceedings) of Tarver's lawyer that he had not prepared adequately for sentencing," Id. at 716, so any hindsighted testimony that "if" Stokes had known that the alibi would not succeed, he would have approached the penalty phase differently is unpersuasive.

In Hannon v. State, 941 So.2d 1109, 1131 (Fla. 2006), as here, trial defense counsel sought to intertwine a humanizing theme with the guilt-phase lingering doubt[9] while avoiding harmful evidence:

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[9] Thus, the issue here is not whether lingering doubt is admissible or a mitigator; in Florida, it is not. Instead, the Strickland issue is whether it is reasonable for defense counsel to continue that theme as a matter of strategy; under the facts of Hannon and here, it is. See Hannon,

> [T]rial counsel in this case testified that his primary goal was to convince the jury that Hannon was not at the crime scene and that he was not the type of person to commit these murders, and that counsel intentionally sought to avoid contradicting that defense by presenting witnesses to testify that Hannon had used illegal drugs, was unstable, failed at school, or was abused.

As here, defense counsel consulted with family members as part of his preparation. Compare 941 So.2d at 1127. As here, defense counsel did not pursue a mental health expert. See 941 So.2d at 1131. Moreover, here, unlike Hannon, defense counsel's strategy was validated with a jury recommendation of life, and the use of a mental health expert (Dr. Toomer) would have invited Dr. Larson's detailed presentation of how Toomer misused tests and how Coleman exhibits an anti-social personality.

Accordingly, Hannon v. Sec'y, 2009 U.S. App. LEXIS 5824 (11th Cir. Fla. Mar. 19, 2009) (discussing Rompilla …), recently affirmed the denial of federal habeas relief, essentially agreeing with this Court's analysis at 941 So.2d 1109. Further, the Eleventh Circuit collected cases that endorsed a lingering-doubt penalty-phase strategy. See 2009 U.S. App. LEXIS 5824, citing Parker v. Sec'y, Dep't of Corr., 331 F.3d 764, 787-88 (11th Cir. 2003); Blankenship v. Hall, 542 F.3d 1253, 1280 (11th Cir. 2008); Stewart v. Dugger, 877 F.2d 851, 856 (11th Cir. 1989); Johnson v. Wainwright, 806 F.2d 1479, 1482 (11th Cir. 1986).

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941 So.2d at 1127 ("Trial counsel further testified that he was fully aware that lingering doubt was not a statutory mitigator. However, trial counsel stated that providing evidence during the penalty phase that Hannon did not have the type of character to commit the murders, and continuing to support the underlying innocence defense, had a real and practical jury effect that would mitigate in favor of the jury sparing Hannon's life").

Here, as in Parker v. Secretary for Dept. of Corrections, 331 F.3d 764, 788 (11th Cir. 2003), counsel consulted with Defendant's family members, and "[c]ounsel did not see any signs of brain damage or mental disorder. Additionally, counsel feared that evidence of mental defects and personality disorder would undermine Parker's credibility and be inconsistent with his alibi defense." Here and in Parker, using a mental health expert would have implicated anti-social personality disorder. Here, as this Court found in Parker, the experts' "testimony regarding brain damage, substance abuse, and personality disorder was 'wholly unpersuasive,'" Parker v. State, 611 So.2d 1224, 1228 (Fla. 1992). Here and there, the defendant's postconviction expert's "conclusions [were] contradicted by the overwhelming evidence in the case," 611 So.2d at 1228. Further, here Dr. Toomer was only willing to posit "a likelihood, the probability of organic impairment, brain damage, organicity" (PCR/V 754) but "strongly recommended" further testing for it (PCR/VI 944), and no evidence of further testing was submitted at the evidentiary hearing. Here, and in Parker, the weight of the aggravation was compelling (here, HAC including raping Merril three times and slashing her throat three times; CCP; and prior violent felonies including four contemporaneous murders, an attempted murder, and several other felonies). Here, the trial court merits affirmance, as it did in Parker.

In Cummings-El v. State, 863 So.2d 246, 251 (Fla. 2003), the postconviction evidence was substantially stronger than here. There, similar to here, trial counsel presented at trial some family testimony in

mitigation that the Defendant is non-violent and innocent. There and here, the postconviction evidence would have "opened the door to extremely damaging testimony … on cross-examination." Some postconviction expert testimony indicated that defendant has anti-social personality disorder. The postconviction evidence failed to meet either of Strickland's prongs. It fails here.

Sweet v. State, 810 So.2d 854 (Fla. 2002), rejected claims like those here. The aggravation is stronger here than there. Here and there, at postconviction, the defendant produced some additional family testimony, including some additional details from the family member who had testified at trial (there a sister, here the mother). Here and there, counsel relied on one or more family members in his preparation for the penalty phase. Here and there, the defendant claimed that counsel "was ineffective in failing to present available mental mitigation during the penalty phase." Sweet held concerning the additional family evidence that the defendant failed to demonstrate the prejudice prong because the postconviction evidence was "essentially cumulative," as it is here, and would have opened the door to some harmful evidence, as it would have here. Further, as here, Sweet involved two experts with differing opinions concerning the defendant, including Dr. Toomer in both cases versus another expert opining that the defendant is anti-social (there, Dr. Ernest Miller, here Dr. Larson). Here, as in Sweet, the trial evidence negates the thrust of the postconviction mitigation evidence from the expert. Here as in Sweet, "given the nature of the mental health mitigation presented by these

experts at the evidentiary hearing, [the defendant] has failed to demonstrate that he was deprived of a reliable penalty phase hearing. Moreover, we cannot conclude that the presentation of the testimony would have led to the imposition of a sentence other than death, given the … strong aggravators and the nature and extent of the additional mitigation evidence presented at the evidentiary hearing."

Conklin v. Schofield, 366 F.3d 1191, 1204-1205 (11th Cir. 2004), rejected a federal habeas claim that the defendant's trial "attorney was constitutionally ineffective because he did not present any mitigating evidence at sentencing." In Conklin, trial counsel, like here, opted for a strategy to humanize the defendant. While in Conklin, defense counsel consulted a mental health expert, here there was no reason to consult one. In both cases, trial defense counsel was reasonable. In both cases, the postconviction evidence failed to demonstrate Strickland prejudice.

Bell v. Cone, 535 U.S. 685 (2002), rejected a claim that counsel was ineffective for failing to call any mitigating witnesses, relying upon limited guilt-phase evidence, only eliciting through cross-examination that the defendant was awarded the Bronze Star in Vietnam, and waiving closing argument at the penalty phase. Cone reasoned that it has held repeatedly that counsel who fails to present any mitigating evidence whatsoever, even when such evidence was available, is not per se ineffective but rather, essentially subject to counsel's reasoned judgment. Cone discussed Darden v. Wainwright, 477 U.S. 168 (1986), and Burger v. Kemp, 483 U.S. 776 (1987), which involved "counsel's decision at a capital sentencing hearing

not to offer any mitigating evidence at all." 535 U.S. at 698. Darden, like here, included a risk of opening the door to evidence of defendant having a "sociopathic type personality," 477 U.S. at 186.

Here and in Cade v. Haley, 222 F.3d 1298 (11th Cir. 2000), new evidence was not strong enough to show Strickland prejudice. Here and in Cade, the new evidence, among other things, would have implicated anti social personality disorder. See Cade, 222 F.3d at 1305, citing Clisby v. Alabama, 26 F.3d 1054, 1056 & n. 2 (11th Cir.1994) (noting reasons why antisocial-personality-disorder diagnoses are not mitigating).

In the face of substantially stronger postconviction evidence than here, Rutherford v. Crosby, 385 F.3d 1300, 1314-16 (11th Cir. 2004), upheld this Courts' finding that the defendant failed to demonstrate Strickland prejudice. See Rutherford v. State, 727 So. 2d 216, 225-226 (Fla. 1998)("not reasonably probable, given the nature of the mitigation offered" would not have "outweigh[ed] the multiple substantial aggravators at issue in this case (HAC, CCP, and robbery/ pecuniary gain") As in Rutherford, Coleman failed to demonstrate Strickland prejudice.

Grayson v. Thompson, 257 F.3d 1194, 1226-30 (11th Cir. 2001)(collecting authorities), upheld a death sentence because of a failure to establish prejudice. As here, the HAC was "brutal." Moreover, unlike here, Grayson did not include CCP and did include several mitigators. Further, Grayson's postconviction evidence was more substantial than here, but like here, in Grayson, the postconviction evidence was not consistently favorable to the defendant.

Thompson v. Haley, 255 F.3d 1292, 1302-1303 (11th Cir. 2001), upheld the state and lower federal courts' finding of no prejudice in spite of additional postconviction mitigation evidence. Here, the weak, controverted quality of the postconviction supposed mitigation "must be weighed against" the weighty aggravation, including "the manner and method of the murder," as well as CCP and the multiple murders, attempted murder, and other felonies.

See also Ventura v. State, 794 So.2d 553, 570 (Fla. 2001)(defendant failed to establish prejudice where the mitigation presented at evidentiary hearing was cumulative of evidence presented at trial); Breedlove v. State, 692 So.2d 874, 878 (Fla. 1997) (three aggravating factors of prior violent felony, during course of burglary, and HAC overwhelmed the postconviction testimony of defendant's friends and family members); Daugherty v. Dugger, 839 F.2d 1426, 1432 (11th Cir. 1988)(concerning prejudice prong, "testimony of these experts would have been subject to rebuttal by Daugherty's prior contradictory statements").

D. Inapplicability of Coleman's case law.

Coleman primarily relies on the following cases as purported support for reversing the trial court's denial of the IAC penalty phase claim: Williams v. State, 987 So.2d 1 (Fla. 2008)(IB 47,51,57); Rompilla v. Beard, 545 U.S. 374 (2005)(IB 42,47,51); Wiggins v. Smith, 539 U.S. 510 (2003)(IB 42,49,51); Williams v. Taylor, 529 U.S. 362 (2000)(IB 41, 51); Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003)(IB 48). None of these cases apply here.

The foundations for Coleman's discussions of the case law are his assertions that defense counsel Stokes concentrated his preparation on the guilt phase (IB 44-46), "[i]nvestigation of mitigationg evidence in Mr. Coleman's history was simply not conducted" (IB 43), and that, as a result, "a wealth of mitigation" was not presented (IB 42, 52-57). The State disagrees with each of these factual predicates. Stokes preparation for the penalty phase was intertwined with his preparation for the guilt phase and circumscribed by Coleman's insistence on his alibi that Coleman articulated to the jury and the trial judge. Coleman's articulateness and intelligence and lack of any apparent mental defect enabled Coleman to present his alibi to the jury and judge and rendered as reasonable Stokes' decision not to pursue a mental health expert and aspects of Coleman's life that significantly deviated from normalcy. For penalty phase preparation, Stokes relied on Coleman's mother, his girlfriend Mary Tookes and perhaps Cassandra Pritchett. (See PCR/V 694-97, 707-708, 721-22). Coleman's postconviction evidence, even after the benefit of years of hindsight, still relied heavily upon Coleman's mother, validating Stokes' reliance upon her, and the jury's life recommendation further validated Stokes' strategic decision.

Co-defendant Ronald Williams' case, Williams v. State, 987 So.2d 1, is inapplicable. There, unlike here, defense counsel had reason to believe that the defendant had mental problems but he failed to follow-up on them. Similarly, while unpresented background also included substance abuse, Williams' defense counsel failed to present several significant aspects of

Williams' childhood, including, for example, being frequently beaten and both parents being alcoholics, and instead "presented only minimal mitigation evidence that Williams helped his loved ones as much as he could." In contrast, here, Coleman's mother testified to many of the same aspects of Coleman's life at the penalty phase as she did at the postconviction hearing. And, here, counsel reasonably decided that his lingering doubt plea would be undermined by negative evidence. In Williams, with "mitigation evidence … literally … in his hand," unlike here, "Williams' defense lawyer was aware that the presiding trial judge had already failed to follow life recommendations by other juries in the cases of Williams' codefendants," 987 So.2d at 12. Moreover, concerning the prejudice prong, this Court had struck HAC as to Williams, whereas here, Coleman was at the crime scene personally perpetuating the HAC aggravator. Here the overlap between the postconviction evidence and the penalty phase evidence, Dr. Toomer's weak and sociopathy-inviting postconviction evidence, and the heavy weight of HAC, unlike Williams, render Coleman's proof of prejudice deficient.

In Rompilla, 545 U.S. at 389-390, "Counsel fell short … because they failed to make reasonable efforts to review a crucial prior conviction file, despite knowing that the prosecution intended to use details of it. The unreasonableness of attempting no more than they did was heightened by the easy availability of the file at the trial courthouse, and the great risk that testimony about a similar violent crime would hamstring counsel's chosen defense of residual doubt." Here, in contrast, defense counsel

"knew" that Coleman looked intelligent and articulate and did not appear to have any mental problems and "knew" this would assist in presenting residual doubt and a-life-worth-saving. Here, defense counsel "knew" that Coleman's family was helpful in gathering mitigation evidence. Here, defense counsel was reasonable, and Coleman has failed to prove Strickland deficiency or Strickland prejudice.

Rutherford, 385 F.3d at 1315, explained the relative magnitude of the omitted "excruciating life history" mitigation in Wiggins, unlike here, as extreme, which included "defendant's long history of severe physical and sexual abuse at the hands of his alcoholic mother and various foster parents. Wigggins' abuse included going for days without food, his hospitalization for physical injury, and repeated rapes and gang-rapes." Further, unlike here, there, the omitted abuse was documented in "state social services, medical, and school records," 539 U.S. at 516. Here, the only background records Coleman introduced for the evidentiary hearing were his school records, which did not present a clear case of mitigation and even harmed Coleman's ("Mack's") cause. Here, in contrast with Wiggins, Stokes' "reasonable professional judgments support[ed] the limitations on investigation." 539 U.S. at 533, quoting Strickland, 466 U.S. at 690-91. In any event, Coleman's postconviction evidence would not have changed the outcome.

In Williams, 529 U.S. 362 (2000), defense counsel limited investigation because of a misapprehension of the law concerning access to records, Id. at 373, unlike defense counsel's observation-grounded and strategy-grounded

decision here. There, documentary evidence supported extensive mitigation: "documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was 'borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin." 529 U.S. at 370. Here, there was no such documentary evidence presented at postconviction, and the additional details of Coleman's childhood overlapped defense counsel's presentation and also showed Coleman's school-cutting, huff-concealing deceit. Further, Coleman's repeated display of his palpable intelligence belies any credible suggestion that he is mentally retarded. See also ISSUE IV infra.

In Hardwick, unlike here, a significant backdrop for the ensuing federal litigation was that this Court had determined that the initial state court evidentiary hearing was inadequate to resolve the postconviction claims. See Hardwick v. Dugger, 648 So.2d 100, 102 (Fla. 1994). Federal Hardwick relied heavily upon its conclusion that defense counsel there substantially misapprehended Florida law on mitigation, See 320 F.3d at 1175 n.190, 1186, 1189, unlike the situation here.

E. Coleman's requested remedy.

Coleman (IB 57) requests as a remedy that his sentenced be reduced to life in prison. However, he failed to argue this point to the Circuit Court and, instead, explicitly requested a new penalty phase or new sentencing. (See PCR/VIII 1211-12, 1239; see also PCR/III 446-47). Therefore, arguendo,

if this Court decides that Coleman has met his burden of proving both Strickland prongs, he is bound to the remedy he requested below.

ISSUE II: HAS APPELLANT DEMONSTRATED THAT THE TRIAL COURT WAS UNREASONABLE IN EXCLUDING EVIDENCE OF DEFENSE COUNSEL'S INTOXICATION? (IB 57-60, RESTATED)

The allegation that defense counsel was intoxicated "throughout the representation of Mr. Coleman" was a subpart of Claim VIII of Coleman's postconviction motion alleging IAC (PCR/III 385). Postconviction counsel's attempt to admit evidence of defense counsel Ted Stokes' intoxication was subjected to a sustained State objection (PCR/V 708, 712, 715-16), thereby preserving the claim that the evidence was erroneously excluded.[10]

The appellate standard of review for admissibility is clear abuse of discretion. See, e.g., Brooks v. State, 918 So.2d 181, 188 (Fla. 2005). Under that appellate standard, the State contends that the trial court's ruling was reasonable, meriting affirmance, because any evidence of counsel's intoxication is inadmissible unless and until the defendant proves Strickland ineffectiveness and then the defendant must show a linkage between that IAC and the purported intoxication.

Bryan v. State, 748 So.2d 1003, 1009 (Fla. 1999), included review of an affidavit from counsel that he was an alcoholic during the time of the

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[10] Prior to the State calling its first witness, Ms. Laverde proffered several documents pertaining to Mr. Stokes and alcohol, which the Circuit Court sealed and which remain sealed. (PCR/VI 834-36; sealed envelope in PCR/VIII and labeled as "pages 1145-68"). Undersigned will continue to honor the seal unless and until a Court directs or authorizes him to the contrary. Undersigned believes that it is unnecessary to examine the sealed documents to resolve ISSUE II.

trial and he was "under the influence of alcohol" when he met with the defendant during the trial. There, "Stokes' equivocal recollection that he may have been under the influence outside of trial does not warrant relief." 748 So.2d at 1009, citing Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir.1987)("There being no specific evidence that Kermish's drug use or dependency impaired his actual conduct at trial, Kelly has not met his initial burden of showing that Kermish's representation fell below an objective standard of reasonableness"). Bryan made it clear that the issue is ineffectiveness, not whether counsel is under the influence or afflicted with alcoholism: "regardless of counsel's condition, he rendered effective assistance," Id. at 1009.

Subsequently, defendant Bryan raised the issue again through a motion to "open and release confidential records pertaining to his trial counsel's treatment for alcoholism." Bryan v. State, 753 So.2d 1244, 1247 (Fla. 2000). Bryan (2000) rejected the argument that "additional evidence concerning trial counsel's substance abuse would show why trial counsel conducted the defense as he did, thus undermining the perception that his conduct was based on trial strategy." Id. The Court discussed and emphasized that the test under Strickland focuses on ineffectiveness and prejudice, not intoxication or under-the-influence, for example:

> [B]ecause Stokes' representation of Bryan was not deficient, and given that Bryan has not suffered any prejudice pursuant to Stokes' representation, the issue of whether Stokes was an alcoholic at the time of trial is irrelevant under Strickland.

Id. at 1249-50. Thus, unless and until Coleman meets his burdens on the Strickland prongs, any evidence of Stokes alcoholism is irrelevant.

Bryan's defense counsel's obtaining a 7-5 jury recommendation was an "accomplishment given the evidence of the brutal murder." Id. at 1248 Here, Stokes accomplished a life recommendation in the face of "brutal murder**s**" and a brutal attempted murder.

Blackwood v. State, 946 So.2d 960, 967-68 (Fla. 2006), upheld the denial of an evidentiary hearing on a defense-counsel-substance-abuse claim and reiterated that the defendant must "demonstrate both that counsel's performance fell below constitutional standards as a consequence of the abuse and that Blackwood suffered prejudice therefrom." The possibility alleged with a "may" is insufficient. Blackwood's claim was insufficient to facially demonstrate the requisite nexus. Coleman's proffer was likewise insufficient.[11]

See also State v. Bruno, 807 So. 2d 55 (Fla. 2001)("there was abundant evidence of counsel's impairment during the representation"; the trial court and this Court ultimately declined relief on that basis).

Moreover, in contrast to Coleman's broadside attempt to slur Stokes' character with irrelevant matters, the prosecutor at the postconviction evidentiary hearing invited postconviction counsel to call Michael Pitts,

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[11] Contrary to Coleman's assertion (IB 59-60), as Blackwood illustrates, a prior judicial determination of effectiveness is not required to exclude the substance-abuse evidence. Accordingly, the proponent of the evidence bears the burden of demonstrating the perquisites for admissibility, thereby here requiring the defendant's demonstration of Strickland deficiency and prejudice and substance-abuse linkage to them as predicates for admissibility. This is sound policy; otherwise, at postconviction, defendants would be invited to slur trial counsel's character without adequate safeguards.

who was a lawyer in the courtroom during the trial (See, e.g., R/I 2; R/XI 1950) and sitting in the courtroom at the postconviction evidentiary hearing, to attempt to link "any evidence of alcoholism or drug abuse or drug use during the course of the trial."(PCR/V 710-11) However, postconviction counsel made no such attempted proffer. (See PCR/V 710-16)

Therefore, the proposed evidence was irrelevant due to its lack of a logical nexus to Strickland's prongs, and there is not even a showing of an impaired state within any of the proceedings in this case. The trial court properly excluded the evidence.

ISSUE III: IS COLEMAN'S DEATH SENTENCE NOW DISPROPORTIONATE DUE TO THE REDUCTION OF RONALD WILLIAMS' DEATH SENTENCE TO LIFE IN PRISON? (IB 60-63, RESTATED)

Coleman contends that because Williams v. State, 987 So.2d 1 (Fla. 2008), reduced co-defendant Williams' sentence to life, he (Coleman) now is entitled to a life sentence. The State disagrees. As this Court observed on direct appeal, Coleman's culpability is more like Robinson's than Frazier's, who also received life. 610 So.2d at 1287-88. Similarly, Coleman's culpability is more like Robinson's than Williams'.

The determination of whether a death sentence is lawful vis-a-vis a life sentence of an accomplice is made by considering whether they are "equally culpable." Hannon v. State, 941 So.2d 1109, 1144-45 (Fla. 2006), quoting Scott v. Dugger, 604 So.2d 465 (Fla. 1992). Here, Coleman, personally involved in the crime-scene suffering and blood of HAC, was much more culpable than co-defendant Ronald Williams, who was not at the crime

scene and who did not direct the manner in which any victim would be killed.

Coleman and his on-the-scene accomplices entered the victims' residence at gunpoint, snatched the cords out of the walls, made the victims undress, and made the male victims lie down. (R/VII 1186-87, 1192-93, 1203-1208, 1210, 1218-22, 1293-94, 1299-1300, 1342-43; R/VIII 1358-61) **Coleman** was armed with a gun. (See R/VII 1294) After Robinson stabbed "Derek," Robinson told Coleman, "if anyone say[s] anything else to shoot them and start with" Amanda Merrill. (R/VII 1299; see also R/VIII 1370-71)

Merrill was on the floor in the living room with her hands tied up behind her back, when **Coleman** put his hands between her legs and told Robinson that he "was going to get some of this." (R/VII 1300) **Coleman** then raped Merrill. (R/VII 1300) Robinson then raped another female victim, "Mildred." Robinson and **Coleman** then "decided they would change up" and Robinson raped Merrill and **Coleman** appeared to rape Mildred. (R/VII 1301) **Coleman** raped Merrill twice in the living room. (R/VII 1331-32) Robinson kicked Derek, and **Coleman** stood Merrill up and took her to another room, untied her legs, kept her hands tied, and raped her a third time. (R/VII 1301) **Coleman** left the room after Robinson called him; "he" said, "I'm going to do this," and Merrill saw **Coleman** in the doorway with a knife. (R/VII 1302-1303)

Robinson told someone to "open up," and **Coleman** entered the bedroom and got onto Merrill's back, pulled her hair back, and cut her neck from left to right. (R/VII 1303) Some shots were fired, and **Coleman** re-entered the

bedroom and cut Merrill's neck again, felt her neck and cut her neck again, making three times that **Coleman** slashed Merrill's neck. (R/VII 1304)

Mildred then begged for her life, and Robinson told her, "Get down, bitch," and another shot rang out. Someone then shot Merrill. (R/VII 1304) Merrill did not know who shot her. (R/VIII 1377-78) The killers left, and Merrill called 911. (R/VII 1304-1305)

In sum, Ronald Williams was not at the mass murder scene when

- the intruders snatched the cords from the walls, forced the victims to strip and tied them up;
- mass-murdering accomplice Robinson knifed Derek and kicked him;
- Coleman put his hands between Merrill's legs and told Robinson that he "was going to get some of this";
- Coleman raped Merrill twice in the living room, and agreed with Robinson to "change up," resulting in Robinson raping Merrill and Coleman apparently raping Mildred;
- Coleman forced Merrill into a bedroom and raped her again;
- Mildred begged for her life and then was executed;
- Coleman slit Merrill's throat twice and then felt it and slit it a third time.

There was no evidence that Williams directed any of the foregoing heinous, atrocious, and cruel manner in which the mass murders were perpetuated. See also facts discussed at Coleman v. State, 610 So.2d 1283 (Fla. 1992); Williams v. State, 622 So. 2d 456, 458 (Fla. 1993)("at Hill's apartment, Mildred Baker and Amanda Merrill were repeatedly raped by Robinson and Coleman").

Therefore, on direct appeal, this Court struck HAC on Williams because the "State in this instance failed to prove beyond a reasonable doubt that Williams knew or ordered the particular manner in which the victims were

killed." Williams, 622 So.2d at 463. In contrast, Coleman not only knew about the HAC method in which the mass murders were perpetrated, he was at the mass-murder scene and an actual perpetrator of that HAC method. HAC applied to Coleman, making him more culpable than Williams, and making the death penalty applicable to Coleman even though this Court reduced Williams' sentences to life in prison.

Bradley v. State, 787 So.2d 732, 746-747 (Fla. 2001), illustrates the significance of Coleman's additional culpability. There, Linda Jones procured the defendant, Donald Lee Bradley, to kill her husband, and she received a life sentence and Bradley received the death sentence. This Court compared Bradley's case with Jones' case and affirmed Bradley's death sentence. There was no indication in Bradley that Mrs. Jones had directed the savage manner in which Bradley killed Mr. Jones. There, "Bradley, with the help of the McWhite brothers and not Mrs. Jones, actually carried out this brutal beating of the victim." In addition, aspects of Mrs. Jones' mitigation and other aspects of the case made Mrs. Jones' situation distinguishable from Bradley's. Here, Coleman, like Bradley, was actually at the crime scene and perpetrating the sexual batteries, kidnappings, and heinous, atrocious, cruel deaths upon the victims.

Like Hannon, Coleman was a full participant at the crime scene. Contrary to Hannon's and Coleman's "assertion, this Court's decision in *Scott* is not persuasive because the instant case does not involve equally culpable codefendants." Therefore, this claim should be denied. 941 So.2d at 1144-45. Moreover, as discussed under ISSUE I, Williams' additional

mitigation was more substantial than Coleman's postconviction evidence that was weak and even harmful to Coleman.

Although this Court held that Williams does not deserve death, Coleman does.

ISSUE IV: IS COLEMAN'S DEATH SENTENCE UNCONSTITUTIONAL UNDER ATKINS? HAS COLEMAN DEMONSTRATED THAT THE TRIAL COURT REVERSIBLY FAILED TO CONDUCT A COMPETENCY HEARING? (IB 63-83, RESTATED)

A. IS COLEMAN'S DEATH SENTENCE UNCONSTITUTIONAL UNDER ATKINS V. VIRGINIA, 536 U.S. 304 (2002)?

Is Rule 3.203(d)(4) unconstitutional?

Coleman contends that Rule 3.203(d)(4)[12] for defendants "who are currently under a sentence of death," is unconstitutional because it "strips them of … Sixth Amendment and due process guarantees" of effective representation. (IB 65-66) In 2005, Mr. McClain had filed in Circuit Court a Motion to Vacate Judgment and Sentence with Request to Amend that contended that Rule 3.203 is unconstitutional because it provides no Strickland guarantee of effective assistance of counsel. (PCR-S2/I 900-25)

The State has five responses, each requiring the denial of this claim.

First, Coleman's Initial Brief has failed to specify how postconviction counsel was prejudicially ineffective in this case concerning the Atkins claim, thereby failing to show that he has standing to raise this sub-claim attacking Rule 3.203. Instead of a showing of specific, pertinent prejudicial ineffectiveness, Coleman characterizes Brody's performance at

[12] For background on Rule 3.203, see Amendments to Fla. Rules of Crim. Proc. & Fla. Rules of App. Proc., 875 So.2d 563, 566 (Fla. 2004).

the Atkins hearing as "dreadful" because he (Brody) did not pursue the claim that Coleman was incompetent to proceed at the time (IB 70-75), but Coleman fails to specify how his (Coleman's) competent presence at the Atkins hearing was important to the merits of that claim. (See also infra "B. HAS COLEMAN DEMONSTRATED THAT THE TRIAL COURT REVERSIBLY FAILED TO CONDUCT A COMPETENCY HEARING?") One counsel's disagreement with a decision by another counsel to proceed with a hearing does not allege specific prejudicial ineffectiveness. Coleman (IB 71 n.46) also accuses one of Coleman's postconviction counsels (Mr. Brody) of having a "track record" and cites to one case in which an accusation was made against Brody in the context of the assertion equitable tolling[13] in a federal habeas proceeding. However, the fact alleged there was not in this case, was not otherwise linked to this case, did not even concern Atkins, and was also only an unproved accusation, subject to an evidentiary hearing in federal court. See, e.g., Carroll v. State, 815 So.2d 601, 609 (Fla. 2002)("he does not point to any **specific** expert he was unable to retain as a result of under-funding").

A **second** reason is a logical application of the first reason: Coleman has woefully failed to demonstrate that he is Atkins retarded and that he

[13] Concerning equitable tolling in federal habeas proceedings, Holland v. Florida, 539 F.3d 1334, 1339 (11th Cir. 2008), clarified that a key aspect of Downs v. McNeil, 520 F.3d 1311 (11th Cir. 2008), was the allegation of counsel's "willful deceit." According to Holland, "Pure professional negligence is not enough" to invoke the principle of equitable tolling in federal habeas.

was thereby harmed by any supposed ineffective representation. Coleman is not mentally retarded and no allegation of ineffective counsel has demonstrated that he is, in fact, retarded. The State elaborates on Coleman's inadequate proof of mental retardation in the next sub-section.

Third, Coleman must initiate allegations of specific deficiencies in the Circuit Court, not here: "Ineffective assistance of counsel claims must be raised in the court in which the alleged ineffectiveness occurred." State v. Riechmann, 777 So.2d 342, 364 (Fla. 2000).

Fourth, since the alleged counsel-deficiency occurred in 2007, Coleman should have filed such motion no later than 2008. See Rule 3.851(d)(1)(one-year time limit); Jimenez v. State, 997 So.2d 1056, 1064 (Fla. 2008)(rejected as untimely a successive rule 3.851 motion); Rutherford v. State, 940 So.2d 1112, 1117 (Fla. 2006)(2006 "ABA Report is not 'newly discovered evidence'"); Glock v. Moore, 776 So.2d 243, 251 (Fla. 2001)("any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence"). Thus, any such claim is time-barred.[14]

Fifth, assuming arguendo, that this Court rejects all of the foregoing arguments and reaches the "merits" of this claim, it has none. Atkins v.

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[14] Continuing the logic of this claim to illustrate the absurd lengths that it can be extended, perhaps Coleman would argue that there is a judicially cognizable claim of ineffective assistance of counsel in failing to timely claim ineffective assistance of postconviction counsel.

Virginia, 536 U.S. 304, 317 (2002), quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986), expressly authorized the states to "develop[e] appropriate ways to enforce the constitutional restriction upon its execution of sentences." Rule 3.203 is a reasonable application of this authority.

This, like other areas, is a situation in which the interests in finality temper a defendant's rights. For example, even where constitutional rights are alleged, an allegation of postconviction ineffectiveness does not bypass the due-diligence requirement of Rule 3.851(d)(2), Fla.R.Crim.P.; see also Rule 3.851(e)(2)(successive motion; requirement of stating reason why not previously raised; "… why the witness or document was not previously available"); White v. State, 964 So.2d 1278, 1285 (Fla. 2007)(approving circuit court ruling: burden on successive petitioner to "specifically explain why" the claim was not "discovered by diligent efforts"); Riechmann v. State, 966 So.2d 298, 305 (Fla. 2007)("when a claim is raised in a successive motion, the movant has the additional burden of demonstrating why the claim was not raised before"; "State is correct that this current claim is procedurally barred and was properly summarily denied by the trial court"). Thus, the procedure for addressing claims of newly discovered evidence at postconviction does not afford Strickland protections in terms how well the newly discovered evidence claim is presented. Indeed, **postconviction ineffectiveness through a lack of due diligence precludes raising claims, including ones that are otherwise of significant constitutional magnitude.**

Accordingly, federal habeas law provides several limitations on what federal claims can be filed and when, thereby procedurally protecting a level of finality and diminishing the ability of a defendant to present constitutional claims. Thus, 28 U.S.C. §2254(i) provides that "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [federal habeas]."

Just as Florida can constitutionally provide that defendants allege defendant incompetence within a Rule 3.850 or 3.851 postconviction proceedings, See Rule 3.851(g), Fla.R.Crim.P., it can constitutionally require that an Atkins claim be raised in such proceedings.

Case law holds that there is no postconviction ineffective-assistance-of-counsel claim pertaining to an alleged right that if made pre-conviction would be subjected to Strickland scrutiny. For example, in spite of the "inmates assert[ing] a number of constitutional theories for an entitlement to appointed counsel," Murray v. Giarratano, 492 U.S. 1, 4, 13 (1989), applied Pennsylvania v. Finley, 481 U.S. 551 (1987), "which held that the Constitution did not require States to provide counsel in postconviction proceedings," to capital cases.

In the state case that the federal Finley reviewed, Commonwealth v. Finley, 497 Pa. 332, 333 (1981), the defendant had asserted a right to postconviction counsel to present two constitutional claims: "(1) the evidence was insufficient to sustain the convictions and (2) evidence obtained pursuant to a search warrant was inadmissible because the search

warrant was based on illegally obtained evidence." The State court afforded the defendant a right to counsel. However, the United States Supreme Court, 481 U.S. 551, reversed and held that the defendant had no right to counsel to present those constitutional claims.

Carroll v. State, 815 So.2d 601, 609 (Fla. 2002), upheld a trial court summary denial of the defendant's "claim that he is being denied his right to effective representation because CCRC lacks sufficient funds" to pursue the defendant rights through hiring an adequate expert.

Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996), rejected a claim that "collateral counsel's failure to appeal the trial court's denial of his request to represent himself constituted ineffective assistance of counsel" because "claims of ineffective assistance of postconviction counsel do not present a valid basis for relief."

See also, e.g., King v. State, 808 So.2d 1237, 1241 n.4, 1245 (Fla. 2002)(rejecting claim that "King's initial postconviction counsel was ineffective for failure to raise various arguments"; collecting cases); Maas v. Olive, 992 So. 2d 196, 204 (Fla. 2008)("we affirm the trial court's grant of summary judgment in favor of Maas and the Chief Financial Officer on the claim relating to the effective assistance of counsel").

Has Coleman proved that he is mentally retarded under applicable law?

After conducting an evidentiary hearing (PCR-S2/II 1072-1203), the trial court rendered an extensive, well-reasoned, and evidence-grounded order explaining why Coleman failed to demonstrate that he is mentally retarded under Atkins, Rule 3.203, Fla.R.Crim.P., and Section 921.137, Fla.

Stat. (PCR-S2/III 1311-96) The Florida provisions require the proof of all three prongs: (1) significantly subaverage general intellectual functioning as evidenced through IQ scores, see also Cherry v. State, 959 So. 2d 702, 712 (Fla. 2007)(rejected claim that "standard error of plus or minus five points should be taken into account so that the actual cutoff score is 75"; strict cut-off of IQ score of 70); (2) concurrent deficits in adaptive behavior; and, (3) onset by age 18. See Burns v. State, 944 So. 2d 234, 245 (Fla. 2006). Jones v. State, 966 So.2d 319 (Fla. 2007), held that a defendant must establish that s/he meets the intellectual-functioning and adaptive-skills criteria for retardation before age 18 and now.

In reviewing the trial court order, "questions relating to evidentiary weight and credibility of witnesses are reserved to the trial court," Brown v. State, 959 So.2d 146, 150 (Fla. 2007)(collecting sample cases). A trial court's findings concerning mental retardation merit affirmance if supported by "competent, substantial evidence." Id. Applying these standards here requires affirmance of the trial court's denial of the Atkins claim after it conducted an evidentiary hearing at which two experts testified, Dr. Toomer (PCR-S2/II 1093-1124) and Dr. Larson (PCR-S2/II 1125-73). The trial court also relied on trial evidence and evidence that had been adduced at the 2001 postconviction evidentiary hearing.

The trial court found that "Defendant has not demonstrated significantly subaverage functioning either currently or manifesting before age 18" (PCR-S2/III 1319) and that Defendant does not "demonstrate concurrent deficits in adaptive behavior" (PCR-S2/III 1321). The trial

court indicated that Coleman's proof was deficient under either preponderance of the evidence standard or the clear and convincing evidence standard of proof. (PCR-S2/III 1321) Under the applicable standard of appellate review, the trial court's findings merit affirmance.

Here, the trial court accredited Dr. Larson's opinion that Coleman is intellectually functioning "above the retarded range." (PCR-S2/III 1316) The trial court reasoned that Coleman scoring a 67 on an IQ test was not determinative. The trial court focused on evidence showing that Coleman malingered on the IQ test and Coleman's school and early-school-testing performance indicating a higher level of intellectual functioning. (PCR-S2/III 1316-17) The Order emphasized the trial testimony that Dr. Larson reviewed, but not Dr. Toomer, and explained:

> The Court has reviewed the testimony of Defendant at trial, during both the penalty and guilt phases, [FN10: R/VIII 1492-1518; R/XI 2032-36][15] and makes a number of observations in that regard. During his trial testimony, Defendant was able to recall specific details regarding the physical appearance of another suspect in the case, and testified that he made 'large sums of money working' doing 'gambling and stuff like that.' [FN11: R/VIII 1496] Defendant's testimony was not shallow, awkward, or hesitant, but rather included confident multi-sentence explanations within his answers. At one point, in fact, Defendant accurately explained that his indictment had been amended. [FN12: R/VIII 1499] In testifying regarding his alibi defense, Defendant also detailed the thought process he pursued in determining where he was on the day of the murders. [FN13: R/VIII 1499-1502] Further, as noted by Dr. Larson, Defendant demonstrated the ability to quickly calculate mathematical figures in his head during the course of his testimony. [FN14: R/VIII 1501] This Court also finds significant, as did Dr. Larson, that Defendant was able to make travel arrangements for himself to travel from Miami, Florida,

[15] The Order's citations to trial record are converted from footnotes to brackets and into this Brief's record-citation format.

> to Moultrie, Georgia, and to fend off probing questions about such from the prosecutor on cross examination. [FN15: R/VIII 1511-14] Similarly, during his testimony at penalty phase, Defendant stated that he had been found guilty of crimes he knew 'nothing about,' and cogently explained his belief that the blood evidence and other physical evidence demonstrated his innocence. [FN16: R/XI 2032-36

(PCR-S2/III 1318-19) Therefore, the record-documented findings are supported by "competent, substantial evidence," thereby meriting affirmance. See also discussion of Coleman's intelligence and defense counsel's additional presentations of Coleman's normalcy in ISSUE I supra.

Coleman's failure to demonstrate significantly subaverage intellectual functioning by itself requires the denial of his Atkins claim because he must prove all three prongs of Rule 3.203 and Section 921.137, Fla. Stat. However, Coleman also failed to prove "concurrent[]deficits in adaptive behavior." The trial court's finding that Coleman failed to meet this prong of the definition of mental retardation is documented with citations to "competent, substantial evidence":

> With regard to Defendant's adaptive functioning, the vast majority of the credible evidence suggests that Defendant is not significantly diminished in terms of the 'effectiveness or degree with which Defendant meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.' [§921.137, Fla. Stat.] For example, his mother testified at trial that she had never seen 'nobody who can beat him yet' at cards and that he made 'quite a bit' of money playing cards,'[FN17: R/VIII 1462] describing him later at the evidentiary hearing as a 'magician' at cards. [FN18: PCR/V 682] This testimony is consistent with Defendant's representations at trial that he was making large sums of money by gambling. [FN19: R/VIII 1496] Defendant's mother, in her testimony at [the] evidentiary hearing in January 2001, also observed that Defendant was 'just the average child' in terms of his behavior. [FN20: PCR/V 662-63] Although she noted that Defendant had taken special education classes and had some difficulty academically, she appeared to relate those difficulties to an undiagnosed hearing problem rather than any mental deficit. [FN21: PCR/V 671-72] Dr. Larson observed at evidentiary hearing that absenteeism was in large part likely a contributor to Defendant's poor academic performance,

> an opinion bolstered by the testimony of Defendant's mother at the 2001 evidentiary hearing. [FN22: PCR/V 684]
>
> In reaching its conclusion, the Court also considers Defendant's capabilities as an adult. At trial, Defendant testified extensively about how he travelled via airplane to Georgia to conduct 'business' with a bondsman, and agreed with the State's assertion that doing so was 'pretty easy.' [FN23: R/VIII 1511-14] Significantly, as pointed out by Dr. Larson, Defendant was perceived by his defense counsel as clearly intelligent. [FN24: PCR/V 697, 707] In fact, Defendant so thoroughly convinced his counsel that Defendant had reliable alibi witnesses that counsel told law enforcement he believed they had the wrong man in custody. [FN25: PCR/V 695, 717-19] Counsel stated that Defendant was able to communicate with him, remember events, describe his version of the sequence of events, and enumerate who would be able to testify as to his alibi. [FN26: PCR/V 717-19] Counsel also noted that Defendant was able to answer questions coherently and logically under both direct and cross examination, and that he had no difficulty in understanding or answering questions. [FN27: PCR/V 728-29] This is corroborated by Dr. Larson's observation that Defendant's level of vocabulary and communication skills were above what one would expect of an individual with impaired adaptive behavior. The Court finds credible Dr. Larson's assessment that Defendant does not suffer significant deficits in adaptive behavior, and cannot and does not place significant value on the results of the SIB-R as administered to Defendant and his mother. The Court's own observations of Defendant and the record evidence are completely at odds with the conclusion that Defendant is functioning at the level of a 13-year-old (Defendant's SIB-R results) or an eight-year-old (Defendant's mother's SIB-R results).
>
> Based on the totality of the evidence before the Court, the Court does not find that Defendant demonstrates concurrent deficits in adaptive behavior.

(PCR-S2/III 1319-21) <u>See also</u> discussion of Coleman's functioning and defense counsel's additional presentations of Coleman's normalcy in ISSUE I <u>supra</u>.

In contrast to the trial court's well-documented Order, Coleman contends (IB 81-82) that fact-finders are bound by the "only" "valid" IQ

score of 67. However, this overlooks three major points: (1) people can malinger scoring lower on IQ tests[16] but they cannot malinger into scoring higher; (2) the trial court could rely on an expert's reasoned opinion that a particular IQ score underestimates a defendant's actual IQ; and (3) Dr. Larson and the trial court pointed to specific facts external to the IQ test per se that supported the opinion and finding. Indeed, Coleman's TOMM score (See PCR-S2/II 1131-33)confirmed the invalidity of the 49 score and also casts doubt on the earlier 67, especially given Coleman's gaming history and anti-social personality disorder. Further, Toomer's use of the SIB test was inappropriate, according to Dr. Larson, (PCR-S2/II 1142-44) and is belied by the numerous examples the trial court provided of Coleman's capacity for adaptive functioning. See also ISSUE I supra. In a word, the 67 score was **invalid**.

Brown v. State, 959 So.2d 146, 150 (Fla. 2007)("trial court clearly found that Dr. McClain's testimony was not as credible as the testimony presented by the other expert witnesses"), rejected a claim attacking a trial court reliance on one doctor versus another doctor. Coleman's claim should also be rejected. As in Brown, "After all conflicts in the evidence and all reasonable inferences have been resolved in favor of the trial court's decision, there is competent, substantial evidence to support this decision."

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[16] Apparently assuming no malingering, Toomer indicated that "you aren't going to get tremendous swings in terms of changes in IQ measurement." (PCR/V 750)

B. HAS COLEMAN DEMONSTRATED THAT THE TRIAL COURT REVERSIBLY FAILED TO CONDUCT A COMPETENCY HEARING?

Coleman argues on appeal that "one of Mr. Coleman's counsel" advanced "reasonable grounds for incompetence" and the trial court "failed to conduct an adequate inquiry." (IB 75) As purported support, Coleman quotes (IB 67-70) Mr. McClain's Second Motion to Disqualify Judge and Notice that Mr. Coleman May Be Incompetent (PCR-S2/I 1037-50). However, this "motion" and "notice" was filed July 3, **2007**, but on January 19, **2006**, Mr. McClain had moved to withdraw as Coleman's counsel in Circuit Court (PCR-S2/I 955-58), and on May 19, **2006**, the trial court had granted Mr. McClain's withdrawal from the case in Circuit Court (PCR-S2/I 984-85). Therefore, by the time of the motion/notice, Mr. McClain was not Coleman's counsel in Circuit Court, rendering the pleading a nullity. See, e.g., Waite v. Wellington Boats, Inc., 459 So.2d 431, 432 (Fla. 1st DCA1984)("A party who appears in an action by an attorney may be heard only through the attorney ..."; "Until such time as Waite's attorney, pursuant to an appropriate motion, is relieved by the trial court as counsel of record, the court may properly strike pleadings which are not subscribed by such counsel in conformance with the applicable rule").

Accordingly, the trial court correctly found:

> Well, Mr. McClain has sort of clouded and muddied the waters because, first, he didn't want to be in the case and serve as Mr. Coleman's counsel. And now he's interjected other collateral issues, and I really have trouble with his participation from the periphery on this case. I understand he's representing Mr. Coleman in some other matters before the Florida Supreme Court. But as far as these matters, **I'm not going to find that he has a standing to raise issues on behalf of Mr. Coleman. You're his counsel of record [referring to Mr. Brody].**

(PCR-S2/II 1076; see also PCR-S2/III 1311 n.1)

Moreover, Coleman's actual counsel in the circuit Court, Harry Brody, explicitly waived this competency claim. Prior to the evidentiary hearing on the Atkins claim, Harry Brody, Coleman's actual counsel in Circuit Court at the time, was provided a copy of Mr. McClain's motion/notice. (See PCR-S2/I 1069; PCR-S2/II 1076-77) Brody had not even been consulted on any "concerns about Mr. Coleman." (PCR-S2/II 1079) At the beginning of the Atkins proceeding, Mr. Brody indicated, "I think I saw him [Coleman] a couple of weeks ago, and I've also talked to him on the phone, but I just haven't seen him in the last four or five days." His observations of Coleman were "good." (PCR-S2/II 1077) As the trial court noted in its Atkins order, Mr. Brody "saw no basis" for raising incompetence (PCR-S2/III 1311 n.1), and Brody explicitly stated that he is not asserting "competency problems," "any lack of competency" (PCR-S2/II 1076). Arguendo, even if somehow it was error to proceed without a competency proceeding, it was waived. See State v. Lucas, 645 So.2d 425, 427 (Fla. 1994) ("only exception [to fundamental error] we have recognized is where defense counsel affirmatively agreed to or requested the incomplete instruction"), citing Armstrong v. State, 579 So.2d 734 (Fla. 1991); Philippe v. State, 795 So.2d 173, 174 (Fla. 3d DCA 2001)("Before the [waiver] exception applies, defense counsel must be aware of the omission and affirmatively agree to it").

If the "notice" was not a nullity and if the competency claim was not affirmatively waived, Coleman still bears the appellate burden of

demonstrating that the trial court abused its discretion by not conducting a full competency hearing. See Lawrence v. State, 846 So.2d 440, 447 (Fla. 2003).

In determining whether there is an abuse of discretion, Rule 3.851(g), Fla.R.Crim.P., requires a competency determination when there are "reasonable grounds to believe" that the defendant is incompetent **AND** when factual matters are at issue that "require the prisoner's input." Here, Coleman has failed to demonstrate either criterion. He has failed to show an abuse of discretion. Instead, the record shows the reasonableness of the trial court's handling of this matter.

The reasonableness of the trial court was buttressed through Mr. Brody informing the trial court that he had recently seen Coleman, that his observations are "good," and that he is not raising competency. In addition, Mr. Brody had initiated a public records request for Coleman's Escambia County jail records (PCR-S2/I 1028-31; see also PCR-S2/II 1090-91: Mr. Brody indicated that he had received the Escambia County jail records), and he introduced April 2007 jail records at the Atkins hearing. Brody, therefore, was informed with those records, which indicated that Coleman refused his medications, and once asked where he is why he is there, and complained about being housed in heightened security at the jail. (See PCR-S2/II 1199-1203) The judge asked Brody whether the jail records impacted his decision regarding Coleman's competency, and Brody responded that he knew about the allegation of the threat but he then explained that

Coleman's back pain was a "legitimate reason" for Coleman not "want[ing] to come and hear the testimony of these doctors." (PCR-S2/II 1091)

In addition, prior to beginning the Atkins evidence on July 17, 2007, the trial judge nevertheless inquired of Coleman over the telephone (PCR-S2/II 1081-87) after Coleman was sworn (PCR-S2/II 1080-81). Although Coleman accused jail personnel of threatening him, he was responsive to the questions, showed no signs of hallucinating, and repeated several times that he did not want to attend the July 17, 2007, Atkins hearing. (See PCR-S2/II 1081-86)

Therefore, not only had Coleman's actual Circuit-Court counsel explicitly denied raising competency and provided the trial court with a basis for that decision (personal visit with Coleman and review of jail records), but also Coleman himself exhibited no indications to the trial court that met the criteria for incompetency: "whether the prisoner 'has sufficient present ability to consult with counsel with a reasonable degree of rational understanding-and whether he has a rational as well as a factual understanding of the pending collateral proceedings." Alston v. State, 894 So.2d 46, 54 (Fla. 2004). Here, there were no "reasonable grounds to believe" that the defendant was incompetent, Rule 3.851(g), Fla.R.Crim.P.

Lawrence v. State, 846 So.2d 440, 447 (Fla. 2003), is instructive. There, like here, there was some sort of report that indicated the defendant might be having mental problems in the proceedings. There and here, counsel for the defendant did not request a competency hearing. There

and here, the trial court paused the proceedings to "engaged in a colloquy with" the defendant. There and here, it was not an abuse of discretion to not stop the Atkins proceedings for steps of Rule 3.851(g), Fla.R.Crim.P.

Further, Dr. Toomer's June 14, 2007, report indicated that he had "assess[ed]" Coleman on June 7, 2007, (PCR-S2/II 1195) only six days prior to Coleman, on June 13, 2007, signing the waiver of appearance for the Atkins hearing (PCR-S2/I 1034-35) and about one month prior to the July 17, 2007, Atkins hearing itself (PCR-S2/II 1072). The Report observed: "No overt behavior indicative of underlying psychopatholgy is elicited." (PCR-S2/II 1196) Dr. Toomer testified at the Atkins hearing that Coleman did not manifest "any kind of psychotic behavior." (PCR-S2/II 1105)[17]

Rule 3.851(g), Fla.R.Crim.P., also requires a competency determination only when factual matters are at issue that "require the prisoner's input." Here, at the evidentiary hearing only experts (Drs. Toomer and Larson) testified, and there is no suggestion that Coleman's "input" was required for the hearing. Indeed, at the 2001 postconviction evidentiary hearing,

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[17] Dr. Larson testified that Coleman told him about hallucinations (PCR-S2/II 1152), but Larson saw Coleman months earlier in April 2007 (PCR-S2/II 1183); at the time that Mr. Brody explicitly waived a competency determination he was informed by his expert's, Dr. Toomer's, opinions; and, Dr. Larson's testimony was based solely on Coleman's self-report, and, as this brief has documented, especially under ISSUE I, the record is replete with Coleman's gaming prowess, his malingering, and his anti-social personality disorder. Therefore, Larson testified that Coleman's reported hallucinations "usually … doesn't happen in bona fide psychiatric patients." (PCR-S2/II 1152)

Coleman even excused himself from the proceeding for a while (PCR/V 636-37, 691).

In sum, in the Circuit Court, the determination of whether competency proceedings should have been initiated on Coleman was within his counsel's province, that is, Mr. Brody's province, not Mr. McClain's. The trial court did not abuse its discretion in not delaying the Atkins hearing and initiating a competency hearing sua sponte.

ISSUE V: DID THE CIRCUIT JUDGE REVERSIBLY ERR BY DENYING MOTIONS TO DISQUALITY HIM? (IB 83-94, RESTATED)

ISSUE V claims that Circuit Judge Geeker erred in not recusing himself in response to two motions Mr. McClain filed to disqualify him while Mr. McClain was not Coleman's counsel. Judge Geeker's orders denying the motions to disqualify should be affirmed.

Background and Standard of Appellate Review.

On July 28, 2004, (PCR/VIII 1324-25) and August 4, 2004, (PCR/VIII 1328-29) Baya Harrison, on Coleman's behalf, appealed the Circuit Court order denying postconviction relief (PCR/VIII 1285-1323).

On April 18, 2005, on Coleman's behalf, Martin McClain moved this Court to relinquish jurisdiction for the Circuit Court to make a mental-retardation determination. (on-line docket, SC04-1520) April 21, 2005, Mr. McClain filed in Circuit Court a Motion to Vacate Judgment and Sentence with Request to Amend claiming that Coleman is entitled to relief under Atkins and Ring. (PCR-S2/I 900-25)

September 23, 2005, this Court granted the April 18, 2005, Motion for a Relinquishment of Jurisdiction for a Determination of Mental Retardation

and directed the Circuit Court to "hold an evidentiary hearing to determine whether the defendant has mental retardation as defined by Florida Rule of Criminal Procedure 3.203." (PCR-S2/I 926)

November 14, 2005, the Circuit Court held a hearing on the request of Martin McClain for attorney's fees and expenses. Mr. McClain and an attorney for the Dept. of Financial Services (DFS) discussed various aspects of Mr. McClain's expenses and fees. (PCR-S3/18 1581-98)

November 22, 2005, the Circuit Court, through a Case Management Order dated November 21, 2005, granted the payment of Mr. McClain's "reasonable costs and expenses" and denied payment for Mr. McClain's attorney's fees. (PCR-S2/I 942-44)

On December 19, 2005, Mr. McClain filed in this Court an Emergency Petition Seeking Review of Non-Final Order in Death Penalty Post-conviction Proceedings. (Attached as an Exhibit at PCR-S2/II 1272-81) The Petition sought review of the Circuit Court's November 22, 2005, Order in this case concerning Mr. McClain's expenses and fees (at PCR-S2/I 942-44). The Petition also asserted allegations against predecessor counsel, Baya Harrison. (See Petition, p. 3 n.2, in SC05-2217)

January 19, 2006, Mr. McClain moved to withdraw from representing Coleman in Circuit Court regarding the remanded Atkins mental retardation proceedings. The Motion indicated Mr. McClain "was not retained to handle the *Atkins* proceedings" and will continue as Coleman's appellate counsel. (PCR-S2/I 955-58)

May 4, 2006, this Court found no error in the Circuit Court's determination that DFS pay Mr. McClain no attorneys fees and directed that Mr. Harrison file in Circuit Court a response to the allegations in Mr. McClain's Petition, specifying service "upon petitioner's counsel, counsel for the State of Florida, and the Executive Director of the Commission on Capital Cases," and directing the Circuit Court to conduct a hearing concerning "whether any sanctions should be imposed by reason of the allegations, including the reimbursement to the State of attorneys fees paid to Harrison." This Court's Order also specified the persons who shall be served with notice of and who shall appear at the hearing: "Harrison, McClain, counsel for the State, and the Executive Director of the Commission on Capital Cases." (SC05-2217)

May 15, 2006, the Circuit Court held a status conference at which Mr. McClain's motion to withdraw was discussed at length. (See PCR-S3 1674-93) Mr. McClain explained his rationale for filing the Atkins claim and the motion to withdraw. (PCR-S3 1679-83) The State suggested that any new attorney appointed to represent Coleman would have the authority to re-evaluate the Atkins claim (PCR-S3 1686-89), and Mr. McClain contended that the Atkins claim continues regardless of which attorney represents Coleman (PCR-S3 1686-87). The Circuit Judge indicated that this Court, in relinquishing jurisdiction for Atkins proceedings, "concluded that an *Atkins* claim in fact exists"; the Circuit Judge also expressed concern over delay due to any newly appointed counsel. (PCR-S3 1688-89)

On May 19, 2006, Circuit Judge Geeker rendered an order that granted Mr. McClain's motion to withdraw as Coleman's counsel in Circuit Court (PCR-S2/I 955-58) and re-appointed Baya Harrison as Coleman's postconviction counsel in Circuit Court. (PCR-S2/I 984-85) The May 19 Order contained the following finding that ISSUE V claims as its first basis for requiring Judge Geeker to disqualify himself: "**The Court finds that Mr. Harrison meets the statutory requirements for appointment and has the ethical standards necessary for such representation in accordance with Fla. Stat. §27.710(5)(b).**" (PCR-S2/I 985)

On May 26, 2006, Mr. McClain filed in the Circuit Court his **first Motion to Disqualify Judge and Supporting Memorandum of Law** (PCR-S2/I 986-92). The Motion alleged that the Circuit Court, through its re-appointment of Baya Harrison using language concerning Harrison "meet[ing] statutory requirements" and having "ethical standards … in accordance with Fla. Stat. §27.710(5)(b)" has "prejudged the matter" that was a subject of this Court's remand concerning Mr. Harrison's fees. (PCR-S2/I 988, 990) On June 6, 2006, **the Circuit Court denied the first Motion to Disqualify Judge, ruling it "legally insufficient."** (PCR-S2/I 993)

On June 12, 2006, Baya Harrison moved to withdraw as counsel for Coleman in Circuit Court. (See PCR-S2/I 1009)

June 26, 2006, Mr. Harrison filed an "Initial Response to the May 4, 2006 Supreme Court Order Including Request to Submit a Detailed Response Containing Exhibits In Camera. "(PCR-S2/I 999-1008) It denied the accusations (PCR-S2/I 1006), including a denial that Mr. Harrison abandoned

the Atkins' claim without Coleman's knowledge. (PCR-S2 1002) In it, Mr. Harrison stated that he has moved to withdraw from representing Coleman because of McClain's allegations. (PCR-S2/I 1001) Concerning possible attorney-client privilege, "[o]ut of an abundance of caution," Mr. Harrison stated that he was "duty bound to submit my detailed, documented response to the court and Mr. Coleman first in camera." (PCR-S2/I 1001-1002) Service was certified as made on the Assistant Attorney General, the Assistant State Attorney, DFS, The Fla. Commission on Capital Cases, Martin McClain, The Fla. Legislature, and defendant Coleman. (PCR-S2/I 1007-1008)

August 18, 2006, the Circuit Court granted Mr. Harrison's Motion to Withdraw and appointed Harry Brody as Coleman's counsel in Circuit Court. The Order included the same language as the order appointing Mr. Harrison: **"The Court finds that Mr. Brody meets the statutory requirements for appointment and has the ethical standards necessary for such representation in accordance with Fla. Stat. §27.710(5)(b)."** (PCR-S2/I 1009-10)

June 5, 2007, the Circuit Court granted Mr. Harrison's request to file a more detailed response in camera and directed that, by June 22, 2007, the detailed response be provided to the Circuit Court under seal with copies to "counsel for Defendant, Martin McClain, and to Lori Job, Assistant General Counsel for the Department of Financial Services." (PCR-S2 1032-33) The Order was copied to several people, including Martin McClain, Harry Brody, and defendant Coleman. (PCR-S2/I 1033)

On July 3, 2007, Mr. McClain filed his **Second Motion to Disqualify Judge** …, which alleged that on June 25, 2007, Mr. McClain received a

package from Mr. Harrison that contained "assertions, allegations and accusations" prejudicial to Mr. Coleman, including accusing Coleman "of endeavoring to embroil Mr. Harrison in criminal activity." (PCR-S2/I 1039-40) The Motion alleged that, because the materials are under seal, were sent to Circuit Judge Geeker, and being kept from Coleman's current counsel, they constitute an ex parte communication with the Judge, requiring the disqualification of Judge Geeker. (PCR-S2/I 1039-40) The Motion was certified as served on Coleman's counsel, Harry Brody. (PCR-S2/I 1050) On July 13, 2007, **Circuit Judge Geeker denied the Second Motion to Disqualify Judge as "legally and facially insufficient."** (PCR-S2/I 1071)

July 17, 2007, the Circuit Court conducted an evidentiary hearing on the Atkins claim. (PCR-S2/II 1072-1203) At the evidentiary hearing, prior to taking evidence, Mr. Brody initiated a discussion of Mr. McClain's Second Motion to Disqualify Judge and Notice that Mr. Coleman May Be Incompetent, first discussing the competency portion of it (PCR-S2/II 1075-77) then discussing the disqualification portion of it (PCR-S2/II 1077-80). In the midst of the discussion, Judge Geeker indicated that he rejects Mr. McClain's "standing to raise issues on behalf of Mr. Coleman" and that Mr. Brody is Coleman's "counsel of record." (PCR-S2/II 1076) Mr. Brody requested that the "Court make some representation on the record that the Court either has or has not reviewed those" documents, to which Judge Geeker responded, "I have not reviewed the submissions from Mr. Harrison." (PCR-S2/II 1076) Brody responded, "Well, that's good then" and asked the Court to dispose of the Atkins claim "before you deal with any of the

allegations" concerning Harrison, "then we wouldn't have any problem." Judge Geeker responded, "All right" and reiterated that he had not yet reviewed Harrison's submission. Mr. Brody concluded: "That's good, I think, from our point of view." (PCR-S2/II 1078-79)

After the Judge interviewed Coleman concerning competency (PCR-S2/II 1081-87), Dr. Toomer and Dr. Larson testified concerning the Atkins claim (PCR-S2/II 1093-1180).

August 1, 2007, Judge Geeker issued his order on the Atkins issue, denying relief, (PCR-S2/III 1311-96) and on August 2, 2007, he conducted a hearing concerning Harrison's fees (notation that transcript remains sealed at PCR-S2/III 1405).

For any preserved disqualification claims, the standard of review on appeal is de novo. See Mansfield v. State, 911 So.2d 1160, 1170 (Fla. 2005).

A. First Motion to Disqualify.

The State has five responses to this claim. Each supports the rejection of the claim.

First, when Mr. McClain filed this Motion to Disqualify Judge, he was not Coleman's counsel in Circuit Court. His motion to withdraw had already been granted. As such, the pleading was a nullity, See, e.g., Waite v. Wellington Boats, Inc., so it cannot be the basis of asserting an appellate claim. Further, Mr. McClain was not a "party" in the proceedings concerning Mr. Harrison's fees. Instead, he was an "interested person." Compare §27.711(12)("any interested person may advise the court…") with Department

of Health and Rehabilitative Services v. Dubay, 522 So.2d 109, 110 (Fla.5th DCA 1988)("A party to an action is defined as 'a person whose name is designated on record as plaintiff or defendant'"); Department of Revenue v. Wrobel, 739 So.2d 670, 672 (Fla. 4th DCA 1999)("State of Michigan was not a party and not subject to the trial courts order requiring it to pay the father's fees"). People "interested" in registry counsel's fees do not have standing to file motions attacking the presiding Circuit Judge.[18] Indeed, that person's role is limited to the fees question and provides no license to question other matters in the case. Therefore, this claim was not preserved through a valid motion to disqualify.

Second, the Motion to Disqualify was directed at the proceedings concerning Mr. Harrison's fees, not the Atkins proceedings (See PCR-S2/I 987), with Mr. McClain claiming to be a "party" to the fees-proceedings (PCR-S2 986). The Motion did not develop an argument that Judge Geeker is, or appears to be, biased concerning Coleman's pending Atkins proceeding. Instead, it asked for Judge Geeker "to disqualify himself from presiding over … proceedings ordered by the Florida Supreme Court regarding Baya

[18] There are a couple of undeveloped ambiguous references to "prejudged the matter remanded by the Florida Supreme Court" (PCR-S2/I 986), "prejudged the matter upon which the Florida Supreme Court has ordered this Court to conduct a hearing" (PCR-S2/I 988), "prejudgment of the matters to be heard" (PCR-S2/I 988-89), and "disqualify himself from further proceedings in this cause" (PCR-S2/I 990), and an allegation of an appearance that the Circuit Court is attempting to avoid a mental retardation hearing (PCR-S2/I 988 n.3)

Harrison in the above-captioned action." (PCR-S2 986)[19] Thus, the claim below was not the same as the claim on appeal, thereby failing to preserve the claim pertaining to this appeal by Coleman in SC04-1520. See Asay v. State, 769 So.2d 974, 981 (Fla. 2000)("these [postconviction] grounds were not raised by Asay in the trial court in a renewed motion for recusal, so they are not properly before this Court").

Third, if somehow the Motion to Disqualify cognizably preserved a claim concerning Mr. Coleman's rights, the Motion was facially insufficient when viewed de novo on appeal. On its face, the language in the Order that the Motion targets was not indicative of any improper bias, but instead it was required by law. Section 27.710(5), Fla. Stat., requires that --

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[19] At one point, the Motion dropped a footnote alleging that Harrison "appear[s]" to be "burdened by a conflict of interest" due to this Court's remand concerning his fees and alleging that Coleman was afraid that Harrison was "working with the State" because Coleman was told that Harrison attempted to obtain Coleman's "personal effects" prior to his re-appointment. (PCR-S2/I 988 n.2) However, there was no attempted argument in the Motion that somehow this allegation required Judge Geeker to disqualify himself.

The Motion dropped another footnote indicating that it "**appears**" that, by its order appointing Mr. Harrison, the Circuit Court is "following the State's suggestion and trying to short circuit" this Court's remand regarding the Atkins issue. PCR-S2/I 988 n.3) However, a passing footnote's **undeveloped** assertion of a **speculative** "appear[ance]" in which there is no link between a party's advocacy **against** the motion to withdraw and the subsequent ruling **granting** that motion is insufficient; further, a ruling is not a valid ground for disqualification, as discussed in the text above; and, the Circuit Court at that May 15 hearing, which was referenced in the footnote, expressly indicated that this Court had already "concluded that an *Atkins* claim in fact exists" (PCR-S3 1689). Moreover, ISSUE V.A does not argue the content of footnote 3 of the Motion, rendering any such argument unpreserved at the appellate level. See Jones, 966 So.2d at 330; Whitfield, 923 So.2d at 379; Hall, 823 So.2d at 763; Lawrence, 831 So.2d at 133; Sweet, 810 So.2d at 870.

> The trial court must issue an order of appointment which contains specific findings that the appointed counsel meets the statutory requirements and has the high ethical standards necessary to represent a person sentenced to death.

This Court has remanded cases for the Circuit Court to address Section 27.710(5) requirements. For example, Sweet v. State, 880 So.2d 578 (Fla. 2004):

> The trial court must issue an order of appointment which contains specific findings that the appointed counsel meets the statutory requirements and has the high ethical standards necessary to represent a person sentenced to death.

Accord Ferrell v. State, 880 So.2d 578 (Fla. 2004). Therefore, the trial court used the same language in subsequently appointing Mr. Brody to represent Coleman. (See PCR-S2/I 1010)

Fourth, the gravamen of the Motion is a complaint about a decision of the trial court to appoint Mr. Harrison, which is essentially a ruling of the trial court, which is facially insufficient to justify disqualification. See, e.g., Rivera v. State, 717 So.2d 477, 480-81 (Fla. 1998).

Thus, in Correll v. State, 698 So.2d 522, 524-525 (Fla. 1997)(capital case), an allegation based on an adverse ruling and an allegation "that Judge Stroker demonstrated bias against Correll's counsel when he suggested that the Office of Capital Collateral Representative (CCR) uses chapter 119 as a delaying tactic in death penalty cases" were insufficient for disqualification. See also Mansfield v. State, 911 So.2d 1160, 1168-1171 (Fla. 2005)(capital case; during penalty phase Judge questioned plea offer; "nothing in the statement that indicated bias or prejudice against Mansfield"); Kokal v. State, 901 So.2d 766, 774-75 (Fla. 2005)(capital

case; "Kokal asserted that Judge Carithers could not be impartial because in *Kight* he had to consider the credibility of both O'Kelly and Hutto, and there he determined O'Kelly to be credible and Hutto not. In the instant action, Judge Carithers was once again faced with considering the credibility of O'Kelly and Hutto"; "fact that Judge Carithers had previously determined that O'Kelly was being truthful in the *Kight* action is not a legally sufficient ground for disqualification"); Chamberlain v. State, 881 So.2d 1087, 1097-98 (Fla. 2004)(capital case; Chamberlain alleged that, based on findings concerning Chamberlain's level of culpability in Judge's order sentencing co-perpetrator Thibault, "Chamberlain had a 'well grounded fear that he [would] not receive a fair sentencing hearing at the hands of the judge'"; "Judge Mounts did not err in denying the motion to recuse"); Waterhouse v. State, 792 So.2d 1176, 1192, 1195 (Fla. 2001)(capital case; prior to re-sentencing defendant, "Sentencing Judge, Robert E. Beach, commented that the subject is a dangerous and sick man and that many other women have probably suffered because of him"; "comment to the Commission did not constitute a prejudgment of any pending or future motions that the defendant might file").[20]

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[20] Since Mr. McClain disagreeing with the content of a ruling is not grounds for disqualification, the State does not discuss the reasonableness of the trial court appointing Mr. Harrison. However the State notes that the re-appointment comported with sound policy attempting to inject some continuity into Coleman's representation. See Fla. Dep't of Fin. Servs. v. Freeman, 921 So.2d 598, 603 (Fla. 2006)(J. Pariente concurring: "Although

And, **fifth**, less than a week after the trial court denied the disqualification motion, Mr. Harrison moved to withdraw, resulting in Harry Brody's appointment (PCR-S2/I 1009, 1009-10), thereby purging any supposed bias or conflict prior to the Atkins evidentiary hearing. [21]

B. Second Motion to Disqualify.

The Second Motion to Disqualify (PCR-S2 1037 et seq) was filed on July 3, 2007, while Harry Brody was counsel for Coleman in Circuit Court (See PCR-S2/I 1009-10). As the trial court noted, Mr. McClain had no "standing to raise issues on behalf of Mr. Coleman"; Mr. Brody is Coleman's "counsel of record." (PCR-S2/II 1076)[22] Therefore, this motion was filed by someone, who at most, was an "interested person" concerning a very limited matter of attorney's fees and who did not represent Coleman in the Circuit Court, making the motion a nullity and insufficient for any relief at any level of

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there may have been good reason to appoint this registry counsel over former CCRC counsel in each of these cases, it is surely preferable to preserve the ongoing attorney-client relationship whenever possible").

[21] The State does not develop an argument in this brief specifically focused on contesting the merits of any claim that Judge Geeker should have disqualified himself from the fees hearing. Indeed, undersigned excused himself from that hearing, the transcript of that hearing appears to still be sealed, and the Circuit Court's Order concerning the fees has not been directly attacked in this appeal and accordingly DFS was not served with the Initial Brief. However, the State notes that most of its contentions pertaining to the pending Atkins proceeding also pertain to the fees proceedings: a person "interested" in registry counsel's fees does not have standing to file motions attacking the presiding Circuit Judge; the language in the Order that the Motion targets was not indicative of any improper bias, but instead it was required by law; the Motion improperly seeks disqualification due to a court ruling; and, whatever unreasonable fear there may have been was purged when Harrison withdrew again.

[22] Indeed, Mr. Brody was not even consulted about the motion before it was filed. (PCR-S2/II 1079)

the judiciary. See Waite v. Wellington Boats, Inc. Compare §27.711(12) with Department of Health and Rehabilitative Services v. Dubay; Department of Revenue v. Wrobel.

Thus, Coleman's counsel (Brody) did not adopt the second motion to Disqualify; instead, stating that he "didn't have anything to do with it" and that he was not "consulted." (PCR-S2/II 1079) Accordingly, Coleman's Circuit Court counsel expressly waived this claim upon Circuit Judge Geeker's assurance counsel that he had not reviewed the sealed materials from Harrison, Coleman's counsel stating "that's good" that the Circuit Judge had not looked at Harrison's materials. (See PCR-S2/II 1076-79)

Yet further, it appears that the disqualification claim has changed **from** the second motion's assertion that an ex parte communication occurred due to Mr. Harrison's submission of sealed materials to the Circuit Court (See PCR-S2/I 1039-40)) **to** Judge Geeker's order that materials be submitted (See IB 94). As such, the appellate claim was not preserved by presenting it to the Circuit Court. See Asay, 769 So.2d at 981 ("As for the incidents occurring during the postconviction proceeding … not raised by Asay in the trial court in a renewed motion for recusal, so they are not properly before this Court").

Moreover, the second motion was untimely. The second motion attacked Harrison's submission of sealed materials, but on June 26, 2006, Harrison's response indicated that he wished to submit sensitive materials under seal (PCR-S2/I 999-1008), and on June 5, 2007, the Judge granted that request in an order copied to McCain, Brody, and Coleman (PCR-S2/I 1032-33). Thus, as

of June 5, 2007,[23] everyone was on notice of the event targeted in the second motion, which was not filed until July 3, 2007, (PCR-S2/I Index p. 3) outside of the 10 days of Rule of Judicial Administration 2.160(e) [24] See also Asay v. State, 769 So.2d 974, 980 (Fla. 2000)("if the conduct or statements occur after the trial, then the postconviction proceeding may be the first time the defendant can raise them in a motion"). But see §38.02, Fla. Stat. (30 days).

Even if Mr. McClain somehow had standing to file the second motion and it was not a nullity, even if somehow the second motion survives Mr. Brody's waiver of this claim, even if somehow the second motion preserved this claim, and even if it was timely, the second motion was still facially insufficient.

There was no allegation in the second motion or indication that the Circuit Judge had reviewed the sealed materials. The allegation of an ex parte communication is merely speculative, making it facially insufficient. See Jones v. State, 845 So. 2d 55, 64 (Fla. 2003)(speculation that one party communicated a proposed order to the judge insufficient). Instead of an allegation of an actual ex parte communication, the motion claimed that

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[23] Perhaps, plus 3 days for mailing. See Rule 3.070, Fla.R.Crim.P. The second motion references the June 5, 2007, order but it does not indicate when Mr. McCain received it. (See PCR-S2/I 1038)

[24] Fla.R.Jud.Admin.2.160(e) has been renumbered as 2.330, but it still requires that the motion be filed within "10 days after discovery of the facts constituting the grounds," In re Amendments to the Fla. Rules of Judicial Administration--Reorganization of the Rules, 939 So.2d 966, 1004 (Fla. 2006).

the documents were submitted under seal and that the Circuit Court "will be reviewing Mr. Harrison's response." (PCR-S2/I 1039-40) Furthermore, if somehow the appellate claim that Judge Geeker's order granting Harrison's request to submit items under seal was preserved, it was still not an ex parte communication: First, the order was copied to Harry Brody and defendant Coleman. (PCR-S2/I 1033) Second, a judge indicating that materials will be submitted to him under seal, thereby enabling a **future** communication, is not itself an ex parte communication at all.

The actual events here illustrate these points. By the time the Atkins hearing, the Circuit Judge had not reviewed the materials (PCR-S2/II 1076-79) and at the beginning of that hearing the Judge appears to have consented to the request of Coleman's counsel (Brody) to dispose of the Atkins claim prior to "deal[ing] with" the Harrison-fee allegations (See PCR-S2/II 1078). No ex parte communication had occurred, and nothing in the Judge's order or the submission of the materials themselves indicated that an ex parte communication would occur prior to the resolution of the Atkins issue.[25]

Further, arguendo, even if it had facially appeared that Judge Geeker intended to review the materials prior to resolving the Atkins issue, trial judge's commonly review otherwise prejudicial materials as part of their screening function, and reviewing facially prejudicial materials, when a

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[25] It is also noteworthy that a party's submission of an Initial Brief is not an ex parte communication even though the Court has not yet heard from the other party through the Answer Brief.

party's counsel is aware of that review, does not constitute ex parte communication.

For example, trial court's review documents claimed to be confidential or exempt from public records, even though the documents may also be prejudicial. See, e.g., Lopez v. Singletary, 634 So.2d 1054, 1058 (Fla. 1993)("we direct the state attorney's office to tender to the trial court the portions of its records that it sealed for an in camera inspection of those documents. If the trial court determines that the sealed documents are exempt from disclosure, the documents will remain sealed"); Lopez v. State, 696 So.2d 725, 728 (Fla. 1997)("We have reviewed the challenged documents in this case and conclude that the trial court did not err in finding that the attorney's handwritten notes dealing with trial strategy and cross-examination of witnesses were not public records"). Thus Rule 3.852(f), Fla.R.Crim.P., directs that the "trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents," thereby indicating that the review-of-records process itself is not ex parte communication. See also Rule 3.852(f), Fla.R.Crim.P. (authorizes in camera inspection); Section 27.7081(6), Fla. Stat.

When the situation arises, trial courts may conduct an in camera hearing concerning defense counsel's representation pursuant to Hardwick v. State, 521 So.2d 1071, 1074-75 (Fla. 1988), approving Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973).

And trial courts review proffers of evidence in which an opposing party is contesting on the very ground of unfair prejudice.

Parnell v. State, 627 So.2d 1246, 1247 (Fla. 3rd DCA 1993)(collecting authorities), held that a motion to disqualify was "not legally sufficient. The trial court had no choice but to take part in the ex parte conversations with the prosecutor in order to ensure the safety of the witness. The judge's mere participation in ex parte conversations was not sufficient to establish a well-founded fear of bias or prejudice towards the defendants." See also Rodriguez v. State, 919 So.2d 1252, 1274-78 (Fla. 2005)(citing Parnell approvingly and rejecting multiple claims based upon denials of disqualification motions). Here, the trial court's Order authorizing the sealed filing of materials was copied to Coleman's counsel, Mr. Brody as well as Coleman himself. (PCR-S2/I 1033) Indeed, at the beginning of the Atkins hearing Mr. Brody was clearly aware of the existence of the sealed materials (See PCR-S2/II 1076-79), and consistent with Brody's request for Judge Geeker "dispose of this part of the case [Atkins claim] before you deal with any of the allegations in that part of the case [Harrison's fees hearing] (PCR-S2/II 1078), the Judge rendered the Atkins order on August 1, 2000 (PCR-S2/III 1311-96) and then, afterwards, conducted the Harrison-fees-hearing (See PCR-S2/III 1405).

Even a judge making a comment explicitly unfavorable to a defendant is facially insufficient for disqualification. The judge is reasonably expected to have the capacity to set the other matter aside when making

future rulings. See, e.g., Waterhouse, 792 So.2d at 1192, 1195 and related authorities collected supra in ISSUE V.A.

For each of the forgoing reasons, the trial court properly denied the second motion to Disqualify,[26] as well as the first one.

ISSUE VI: HAS APPELLANT DEMONSTRATED THAT THE CIRCUIT COURT REVERSIBLY ERRED IN DENYING CLAIMS ALLEGEDLY BASED ON BRADY AND KINDRED CASES? (IB 94-98, RESTATED)

This issue lists (IB 96-97) several items that Coleman claims should have been disclosed to his trial counsel: criminal histories of Gwendolyn Cochran, Arabella Washington, Cassandra Pritchett, and Amanda Merrill and the status of Travis Williams and Gregory Manning as suspects by the State.

A. Coleman's Brady burdens.

Riechmann v. State, 966 So. 2d 298, 307-308 (Fla. 2007), summarized a postconviction petitioner's burdens to establish a claim pursuant to Brady v. Maryland, 373 U.S. 83 (1963):

> *Brady* requires the State to disclose material information within its possession or control that is favorable to the defense. *Mordenti*, 894 So.2d at 168 [Mordenti v. State, 894 So.2d 161 (Fla. 2004)] (*citing Guzman v. State*, 868 So.2d 498, 508 (Fla. 2003)). To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *See Strickler v. Greene*, 527 U.S. 263 (1999).

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[26] The second motion also mentioned that the Circuit Court "refused to appoint" Mr. McClain in 2005 (PCR-S2/I 1040-41) and, in passing, that Mr. McClain was successful on appeal in Switzer v. State, 940 So.2d 1248 (Fla. 1st DCA 2006) (PCR-S2/I 1041 n.6). However, these matters are not presented in ISSUE V. If they had been raised on appeal, each of the arguments in this section of ISSUE V would apply.

> To establish prejudice or materiality under *Brady*, a defendant must demonstrate 'a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial.' *Smith v. State*, 931 So. 2d 790, 796 (Fla. 2006) (*citing Strickler v. Greene*, 527 U.S. 263, 289 (1999)). 'In other words, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."' *Id.* (*quoting Strickler*, 527 U.S. at 290).

Ponticelli v. State, 941 So.2d 1073, 1084-85 (Fla. 2006). With regards to *Brady*'s second prong, this Court has explained that '[t]here is **no *Brady* violation where the information is equally accessible to the defense and the prosecution**, or where the defense … had the information.' *Provenzano v. State*, 616 So.2d 428, 430 (Fla. 1993) (*citing Hegwood* v. State, 575 So.2d 170, 172 (Fla. 1991); *James v. State*, 453 So.2d 786, 790 (Fla. 1984)). Questions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determinations of such questions will not be disturbed if they are supported by competent, substantial evidence. *Way v. State*, 760 So.2d 903, 911 (Fla. 2000). This Court then reviews de novo the application of the law to these facts. *Lightbourne v. State*, 841 So. 2d 431, 437-38 (Fla. 2003).

B. Postconviction motion, facially insufficient.

Claim IV of Coleman's 2000 postconviction motion (PCR/III 373) contained only conclusory, non-specific allegations regarding criminal histories.[27] Although the trial court's Huff order "believed" that the claim was legally insufficient, it granted an evidentiary hearing "out of an abundance of caution." (PCR/IV 571) The trial court belief was correct: This claim was insufficiently pled. It failed to specify the nature and magnitude of the "criminal histories" and whether they even existed at the

[27] The State also notes that the postconviction motion contained a claim concerning some sort of payments to Amanda Merrill, but it was expressly abandoned at the evidentiary hearing (See PCR/VI 824), and Coleman presented no evidence whatsoever to support it, thereby failing to meet his evidentiary burden.

time of trial. The postconviction motion also failed to allege that defense counsel did not obtain the records on his own or have access to the records. As such, the postconviction motion was insufficient. Under the principle of right-for-any-reason, the trial court's denial of this claim should be affirmed. See, e.g., Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review, also called the "tipsy coachman" doctrine); Dade County School Bd. v. Radio Station WQBA, 731 So.2d 638 (Fla. 1999); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it").[28]

C. Coleman failed to meet his burdens at the evidentiary hearing.

As the trial court ruled (PCR/VIII 1290), Coleman failed to meet his burdens. Coleman failed to prove at the evidentiary hearing that the State suppressed any criminal histories and that any alleged criminal history was material and prejudicial.

At the evidentiary hearing, Coleman presented no criminal histories, thereby failing to meet his burden. After Coleman's counsel presented Toomer's testimony, counsel discussed criminal histories, the prosecutor contended that "there has been no evidence whatsoever presented to this Court that there is any criminal history on any of these people. So our

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[28] In addition, the State has not located where the 2000 postconviction motion alleged that Travis Williams and Gregory Manning were suspects. Therefore, this claim was unpreserved below.

position is we really don't have to prove anything." After Coleman's counsel complained that criminal histories were sealed at the repository and she could not produce her investigator's notes on the matter, the prosecutor indicated that in Florida "anyone can request from FDLE the criminal history" and returned with some criminal histories. (PCR/VI 827-31; see also PCR/VI 823; PCR/IV 550-51) The prosecutor was correct. See §943.053, Fla. Stat. ("Dissemination of criminal justice information"); ch. 80-409 §5, Laws of Fla. (provides private access to criminal history information). Therefore, Coleman failed to prove that the State failed to produce any postconviction evidence that was not already readily available to the trial defense. Here, "the information is equally accessible to the defense and the prosecution."

Thus, Coleman's Closing Memorandum did not argue a claim based on these records (See PCR/VIII 1205-1212), then, after the State's Post-Evidentiary Hearing Memorandum contended that Coleman is abandoning this claim (PCR/VIII 1214-15), Coleman's reply Closing Memorandum still failed to argue this claim (See PCR/VIII 1235-40).

Further, even now, Coleman fails to show the Brady materiality of any criminal history. Instead, he avers (IB 96-97) that Stokes testified that he would have used criminal histories to impeach witnesses, which fails to overcome the deficiencies of this claim. There was no showing of the existence of the specific histories during the May 1989 trial, the specific vintage of the histories, their unavailability, or their magnitude (type of

crime, whether there was a conviction, …) in terms of materiality or prejudice.

The prosecutor at the 2001 postconviction evidentiary hearing generated FDLE computer runs of criminal histories, which were introduced into evidence. (PCR/VI 830-32; PCR/VIII 1183-1200)[29] Although the State bore no burden below and bears no burden here, the records affirmatively demonstrate a lack of materiality. **Gwendolyn Cochran**'s record shows a 1977 dismissed charge, an arrest but no information filed, a 1994 post-trial offense date, and an October 21, 1988 drug offense. (PCR/VIII 1191-94) On direct examination at the trial, Cochran admitted to "pick[ing] up some money and drugs" (R/IV 703-704; see also R/IV 719-22) and admitted on cross-examination to pleading no contest to trafficking with sentencing pending (R/IV 708-709, 713-15; see also R/IV 718-19). Therefore, the criminal history added nothing material/prejudicial; the important facts were already before the jury. It appears that **Arabella Washington** had a misdemeanor about 10 years after this trial (See PCR/VIII 1196), and at the trial she admitted to being arrested for lying (PCR/VI 107-80, 1097-99). Again, Coleman failed to demonstrate anything withheld in 1989 and material to the trial court (or here). Concerning **Cassandra Pritchett**, at the Huff hearing Coleman's counsel had narrowed the list of witnesses for this claim so that it excluded Pritchett. (See PCR/IV 545-48) Therefore, the prosecutor did not generate a computer criminal history on her (Compare

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[29] The type on the State's appeal copy of the exhibit is very faint.

PCR/VI 827 with PCR/VI 831-32) and the postconviction hearing is devoid of anything to support any related Brady allegation.

Amanda Merrill's[30] criminal history was inconsequential, included one or more entries that did not exist at the time of the 1989 trial, and it would have harmed Coleman's cause at trial. (See PCR/VIII 1183-90) At the postconviction evidentiary hearing, the State called Ms. Merrill as a witness. (PCR/VI 839-42) She testified that there were some 1988 charges on her (i.e., prior to this 1989 trial) that were dismissed because she was the victim of a man breaking into her house. (PCR/VI 839-40) She also said she had a series of worthless check cases in 1988 **due to her injuries in this case**, she paid restitution, and adjudication was withheld. (PCR/VI 841; see also PCR/VIII 1183-90) There was no cross-examination. (PCR/VI 842) If the jury had known about Ms. Merrill's "criminal history," it would have tended to evoke sympathy for her and harmed Coleman's cause. No Brady materiality/prejudice has been shown.

Concerning **Travis Williams** and **Gregory Manning**, the State has not found where Claim IV of the postconviction motion asserted suspect-status of anyone as Brady material (See R/III 372-78), thereby failing to preserve these claims.[31] Accordingly, the Court did not grant an evidentiary hearing

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[30] The State disputes the allegation that Ms. Merrill was the "only eyewitness" (IB 96), but she, nevertheless was one among several important trial witnesses.

[31] Coleman's counsel's mentioning Travis Williams and Gregory Manning at the Huff hearing was untimely, unsworn, and also facially deficient due to non-specificity. (See PCR/IV 548-49)

on these matters (See PCR/IV 570-71), Coleman's postconviction memoranda did not argue these claims (See PCR/VIII 1205-1212, 1235-40), no evidence was introduced establishing any material status of these persons in the sense of Brady prejudice, and Coleman failed to obtain an appeal-requisite ruling from the trial court on this matter. See also, e.g., Overton v. State, 976 So.2d 536, 562 (Fla. 2007)("Even if elimination did occur and additional reports do exist, Overton has not provided a convincing reason why or how these reports would demonstrate that he had been eliminated as a suspect because his work alibi defense had been confirmed by law enforcement"), citing Carroll v. State, 815 So.2d 601, 620 (Fla. 2002); Overton v. State, 976 So. 2d 536, 563 (Fla. 2007)("nothing fruitful resulted from law enforcement's investigation into other suspects"), citing Wright v. State, 857 So.2d 861, 870 (Fla. 2003)(holding that the information contained in the police files with regard to other possible suspects was not Brady material).

ISSUE VII: IS APPELLANT ENTITLED TO RELIEF BECAUSE A PORTION OF A COUNT THE INDICTMENT ALTERNATIVELY INCLUDED ATTEMPTED FELONY MURDER LANGUAGE? (IB 98-100, RESTATED)

Claim XII of the postconviction motion raised this claim (PCR/III 421-23; see also PCR/III 386), which the trial court denied. The trial court's reasoning merits affirmance:

> The Defendant alleges that the verdict form did not require the jury to specify whether they found evidence of premeditated murder or felony murder. Further, the Defendant alleges that pursuant to the Florida Supreme Court's decision in State v. Gray, 654 So.2d 552 (Fla. 1995) (holding that there is no criminal offense of attempted felony murder in Florida), the Defendant's conviction on count five should be reversed. However, State v. Gray was decided six years after the Defendant's trial in 1989. The Defendant has failed to show

> that the Florida Supreme Court intended for State v. Gray to apply retroactively.
>
> Furthermore, the Florida Supreme Court has held that 'while a general guilty verdict must be set aside where the conviction may have rested on an unconstitutional ground or a legally inadequate theory, reversal is not warranted where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient.' Mungin v. State, 689 So.2d 1026, 1030 (Fla. 1995). In Teffeteller v. State, 438 So.2d 840 (Fla.1983), the Defendant alleged that the trial court erred in failing to instruct the jury on the essential elements of the underlying felony, and the court inadequately instructed the jury on the underlying felony of attempted robbery. The Court held that a 'conviction can be sustained not solely under a felony murder theory, but also under a premeditation theory. The latter being valid, the alleged inadequacies of the underlying felony instructions become moot.' Teffeteller v. State, 439 So.2d 840, 844 (Fla. 1983). Accordingly, the Defendant is not entitled to relief on this claim.

(PCR/VIII 1297-98, underlining in original) [32]

Accordingly, State v. Woodley, 695 So.2d 297, 298 (Fla. 1997), held that Gray was not retroactive and reasoned:

> In *State v. Wilson*, 680 So.2d 411 (Fla. 1996), we dealt with the issue of whether attempted felony murder was a 'nonexistent' offense in the traditional sense. There we wrote:
>
> > In the earlier cases, 'nonexistent' had a slightly different connotation. There, the offenses in question were never valid statutory offenses in Florida; they were simply the product of erroneous instruction. Here, attempted felony murder was a valid

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[32] Williamson v. State, 994 So. 2d 1000, 1016-17 (Fla. 2008), cites to: "*** *Valentine v. State*, 688 So. 2d 313, 317 (Fla. 1996) (reversing convictions for attempted first-degree murder based on Gray where the jury's verdict may have relied on a legally unsupportable theory). However, unlike here, Valentine was a direct appeal pending while Gray was decided. Further, Coleman cannot show "that the conviction" of Attempted First Degree Felony Murder "has been reversed," Owen v. State, 986 So.2d 534, 559 (Fla. 2008). Also, due to the other aggravation there, Valentine did not disturb the death sentence. There is substantially more aggravation here than in Valentine. See Issues I and III supra.

> offense, with enumerated elements and identifiable lesser offenses, for approximately eleven years. It only became 'nonexistent' when we decided Gray. Because it was a valid offense before Gray, and because it had ascertainable lesser offenses, retrial on any lesser offense which was instructed on at trial is appropriate.

> *Wilson*, 680 So.2d at 412-13. Consistent with this rationale, and with our statement in *Gray* itself that the decision 'must be applied to all cases pending on direct review or not yet final,' we hold that *Gray* does not apply retroactively to those cases where the convictions had already become final before the issuance of the opinion.

See also Van Poyck v. Singletary, 715 So.2d 930, 935 (Fla. 1998)("Because the crime of attempted felony murder was a valid offense when Van Poyck's convictions became final, he is not entitled to the relief requested"). Thus, Williamson v. State, 994 So. 2d 1000, 1016 (Fla. 2008), recently reiterated that Gray was prospective, rather than retroactive: "The Court held that the *Gray* decision 'must be applied to all cases pending on direct review or not yet final.' *Id*. at 554."

Moreover, this is a direct-appeal type of claim, thereby procedurally barring it here. Compare Coleman v. State, 610 So.2d 1283 (Fla. 1992)(decided December 24, 1992), with, e.g., Lopez v. Singletary, 634 So. 2d 1054, 1055 (Fla. 1993)("(8) the court applied an improper automatic aggravator" barred). Furthermore, counsel cannot be ineffective for failing to anticipate Gray, decided six years after this trial. See, e.g., Cherry v. State, 781 So.2d 1040, 1053 (Fla. 2000)("trial counsel cannot be held ineffective for failing to anticipate changes in the law").

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on April 20, 2009:

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CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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